Unpaid Care Work and Gender Equality in EU Law:

Evaluating EU Social Policy and EU Free Movement of Persons Law

Nina Miller Westoby

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School of Law, College of Social Sciences

University of Glasgow

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Abstract

The focus of this thesis is the relationship between gender, care, and EU law. Gender equality and unpaid care have featured in EU policy making for decades. Through the evolution of the EU Social Policy agenda of "work-life balance" the EU has had a positive impact on advancing gender equality and the more equal allocation of unpaid care work. However, progress has not always been consistent or coherent and there have been setbacks and periods of stagnation. Demographically, gender equality in the EU is improving at an extremely slow pace and the majority of unpaid care work continues to be done by women, impacting, amongst other things, women's economic independence.

The aim of this thesis is to evaluate how the EU is responding, in law and policy, to the gendered allocation of unpaid care, and how far the EU is advancing gender equality in this context. To do this this thesis adopts a socio-legal approach combining doctrinal research with interviews held with members of civil society organisations. Two fields of EU law are explored. The evolution and most recent developments in the EU Social Policy agenda of "work-life balance" are studied, up to and including the Work Life Balance Directive 2019/1158 which was adopted by the Council in 2019. EU Free Movement of Persons Law is also studied for the impact that the rules have on women with caring responsibilities. This responds to a reported neglect in EU legal scholarship on the gender dimension of intra-EU mobility. The interviews explore the impact of the EU law rules on the ground. They also explore the processes of policy and legal reform in each field from the interviewees' perspectives with a view to anticipating the potential for progress towards gender equality and the fairer allocation of unpaid care work in the context of EU law in the future.

Two overarching questions have been developed that structure the analysis throughout this thesis. These questions are firstly, to what extent is unpaid care work visible in EU law and policy? Secondly, how far do the legal rights transform the gendered roles associated with unpaid care work, and how far do they entrench them? The development of these two questions was informed specifically by the work of Nancy Fraser and more generally by a feminist ethic of care. These two questions have enabled the study of two areas of EU law and policy, that are

very different in their treatment of the subjects of gender and care, to be conducted in a consistent and illuminating way.

This thesis found that through the innovation of studying the two fields of law together the similarities, shared challenges and contradictions of these two fields could be interrogated. The narratives that emerge from the study of these two fields are very different. Most prominently, this thesis found that despite a period of stagnation the field of EU Social Policy has been invigorated and at the heart of the most recent developments is care. However, there remain shortcomings in the scope of the rights which limit their ability to affect significant change in the context of the gendered allocation of unpaid care. Secondly, despite the gender-neutral quality of the free movement of persons rules, the legal framework, as interpreted by the Court of Justice of the EU, currently entrenches a regressive gender order which is negatively impacting women with caring responsibilities when she is exercising her right to free movement. Furthermore, this thesis finds that the neglect of the gender dimension of intra-EU mobility extends beyond the scholarship and legal framework to EU and UK civil society and informal policy making and legal reform processes. As such there is a need for further work that will increase awareness among actors engaged in the field of EU free movement of persons law on how the legal rules are impacting women if there is to be progress in the future on gender equality and the more equal allocation of care work in the context of EU law. In this way this thesis provides a platform for the EU and civil society to address and respond to the shortcomings and inconsistencies in its approach to equality between women and men.

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Acknowledgment

The opportunity to dedicate myself to this PhD was made possible by the funding opportunity granted to me by the ESRC, and the University of Glasgow who hosted me, and for this I am extremely grateful, it has been an immense privilege.

This thesis is concerned with EU law, gender equality and care. I have delved into the academic aspects of each of these elements as part of this thesis. However, during the period, I have been working on this subject each of these elements, EU law, gender equality and care have been brought to life for me in ways I could not have predicted. They have been implicated in significant events both on the world stage and in my own personal life and these are important to mention in the context of acknowledging and thanking those who have supported me throughout this journey.

The events unfolding throughout the period of writing this thesis include the UK vote to leave the EU signalling the end of the ever-increasing pan-EU cooperation as we have come to know it, and the potential for rights once governed by EU law to be rolled-back in the UK; the election of President Trump in the USA despite amongst other things, accusations of sexual misconduct; and the global gender equality movement #Me Too revealing the extent of male perpetuated abuse experienced by women. These events were shocking and temporarily destabilising not least because assumptions I had about the world around me seemed to be turned on their head. Most prominently, the assumption that was undermined by these events was a belief I had held that we live in a time where the aspiration of social progress and continued international cooperation in this regard is largely accepted. From a legal perspective, interested as I am in individual rights and gender equality, these political developments demonstrated to me how easily rights can be rolled back, and that the maintenance and advancement of social rights requires a continued and persistent effort by many, many people to hold the line and if lucky push that line forward. In this sense I came to appreciate the fragility of the status quo and that neither the status quo nor future progress can be taken for granted.

The personal events that unfolded during the progress of this thesis include the births of my two children, Faolán and Eleni-Sofia and as such, along with my

husband Guy, becoming a parent. It also included, sadly, the death of my father-in-law, Peter, for whom my husband cared for during some of his final days. These personal life events transformed my understanding of care, a concept which I was already interested in legally, politically and theoretically but which my life now very much revolved around. Caring for dependent babies and flourishing toddlers and observing Guy care for his father revealed to me the strength and courage it takes to turn up and care for those in our lives, as well as the potential that this care has to move us, affect us profoundly and lead to our own growth.

The final event that took place in the background to this PhD, that is important to mention, is the COVID-19 pandemic. Much of the drafting of the final version of this thesis was done during the "Lockdown" in 2020. The immediate challenges that I faced in terms of coping with working from home whilst schools and nurseries were closed and whilst trying to support my family and those around me was shared by many people, locally and on a global level as many countries were imposing similar Lockdown measures. These personal challenges, shared in a new way and on an unprecedented level, became visible and publicly debated. This experience appeared to break open what had previously been taboo, that is, our caring responsibilities and how they impact us, our work, our mental health, and our overall capacity. Furthermore, in more ways than one, the social experience of the COVID-19 pandemic revealed how vital our, often unseen and unacknowledged, caring responsibilities are and how they are interconnected with how we work, and more broadly, how our society runs and functions.

These events brought home to me how important and interconnected law, gender and care are, but they also made a turbulent context for attempting to progress the research and writing of this thesis. As such these events make all the more deeply felt the gratitude, I have for the people that supported me. The strength, insight, honesty, optimism, and persistent hard work of those around me during these complicated times inspired and supported me, enabling me to keep a steady course. Most prominently are my supervisors Professor Jane Mair and Maria Fletcher. Whilst from the outside our supervision meetings may have appeared to be very smooth, remarkably enjoyable, sociable affairs often revolving around beautiful cakes and black coffee, they were in fact very sophisticated sites of

guidance, encouragement and critical engagement and where I am aware great patience on Jane and Maria's part was demanded. I have benefitted hugely from having this wonderful supervision team. The demands on Jane and Maria intensified greatly when in 2019 they became Head and Deputy Head of School respectively, but their support and commitment didn't waver. Jane and Maria, thank you very much.

I would also like to express sincere thanks to Professor Noreen Burrows who, as one of the last things she did before retiring, looked over my scholarship application, gave it a thumbs up and gave me the confidence to approach Jane and Maria and embark on this adventure. Relatedly, I would also like to thank Professor Rosa Greaves who enthusiastically endorsed my decision to do a PhD and provided crucial support in discussing funding possibilities. Rosa also insisted that if I set my mind to it, I could wrap it up in less than the allocated three years, but alas, two periods of maternity leave later, that was not to be! Professor Ruth Dukes temporarily joined my supervision team during Maria's maternity leave and I would like to thank her for her engagement and feedback. More broadly there has been a research community at the University of Glasgow that has been fun, stimulating, and supportive. I would like to thank my fellow PhD colleagues for their friendship, gallows humour when required, and for setting the academic bar so high! They are, Anni Pues, Asli Oklay, Athene Richford, Catriona Cannon, Beth Pearson, Felicity Belton, Ou Lin and Sare Hatice Temel. Friends and former colleagues have also provided encouragement from near and far and I would like to thank them too, they are Anja Lansbergen-Mills, Kyela Leakey and Claire La Hovary.

Finally, I would like to thank my family. Firstly, my Mum, Brenda and my Dad, Alan for their love and support and who have influenced and inspired me through the integrity and humanity through which they lead their own lives. And I would like to thank Faolán and Eleni-Sofia who have very much been part of this adventure, they were both born during and have both been blossoming alongside this enormous project. They are my pride and joy. And lastly, my husband Guy. I am constantly amazed by Guy and I am very grateful to him. Embarking on, let alone completing, this PhD would not have been possible without him, his love, support, laughs and unwavering belief in me. Bafflingly, he has managed to sustain an interest in the

subject of this thesis for years and the excitement and energy he created as he read the final drafts were critical to me getting to the finish line. His humour, curiosity and sense of adventure is infectious, and he has sustained us all throughout this experience. Thank you. It is to Guy, Faolán and Eleni-Sofia that this work is dedicated.

Author’s declaration

“I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.”

Printed Name: Lenina (Nina) Miller Westoby

Signature:

Chapter 1 Introduction

The focus of this thesis is the relationship between gender, care, and EU law. It is specifically concerned with gender equality and the impact on women of the unequal distribution of unpaid care work. The aim of this research is to evaluate how the EU is responding, in law and policy, to the gendered allocation of unpaid care, and how far the EU is advancing gender equality in this context. To do this, this thesis undertakes socio legal research. It explores two fields of EU law and policy, EU Social Policy, and EU Free Movement of Persons law, and it combines doctrinal analysis of these areas with analysis of interviews with third sector stakeholders active in each field. The overarching aim of this thesis is to bring new perspectives of analysis to current discussions on care and gender equality in EU law and to provide a platform from which the EU institutions and civil society organisations may respond to current shortcomings in the policy and legal frameworks.

In the EU, as for the rest of the world, women are "engaged disproportionately more in unpaid care work" than men and are simultaneously increasingly participating in the labour market.[1] They are the main carers of children, people with a disability, illness, and the elderly and 38 percent of women spend one hour a day or more on caring duties compared with 25 percent of men. [2] For one parent families, largely headed by women, the time spent on unpaid care by women is even more pronounced.[3] Women's participation in the labour market is increasing,[4] and there is a rise in the "adult worker model" across the EU, where both women and men are conceived of as "citizen workers" and where care needs are

[1] Oxfam, "*Time to Care. Unpaid and underpaid care work and the global inequality crisis*", (Oxfam GB for Oxfam International, 2020) available at https://www.oxfam.org/en/research/time-care, (last visited 2 November 2020); European Institute for Gender Equality (EIGE) "*Gender Equality Index 2019 Work-life balance",* available at https://eige.europa.eu/publications/gender-equality-index-2019-work-life-balance (last visited 2 November 2020).
(Publications Office of the European Union, 2019), p. 48, almost 38 per cent take care of children, grandchildren, older people and/or people with disabilities every day for 1 hour or more compared with 25 percent of men.
[2] European Commission, "*2018 Report on Equality Between Women and Men in the European Union*", (European Commission, 2018), p.7.
[3] EIGE, "*Gender Equality Index 2019 Work-life balance",* cited *supra* note 1, p.49.
[4] EIGE, "*Gender Equality Index 2019 Work-life balance",* cited *supra* note 1, p.29.

increasingly allocated to the public and private sector.[5] However, there persists a presumption that women have primary responsibility for care work.[6] Furthermore, more than four in ten Europeans believe that housekeeping and raising children, is the most important role of a woman.[7] As a result, women are now often performing a "double day" or "second shift" where they must combine paid and unpaid work on a daily basis.[8]

Background: care and gender in the EU today

The impact of the unequal distribution of unpaid care work on women is complex. At the outset, it manifestly affects women's economic independence in several ways including most prominently the gender employment gap, the gender pay gap and the gender pension gap. The gender gaps will be discussed briefly here. Relative to men, women are employed less. In 2017, the employment rate of working aged women (20 - 64 years) in the EU was 11.5 percent lower than that of men.[9] The employment gap is notably greater for mothers and women with caring responsibilities, with parenthood having a negative impact on women's employment but boosting men's employment rate, in nearly all European countries.[10] In 2017 nearly 10 percent of economically inactive women in the EU were inactive because of care duties whereas this was true for 1 percent of men.[11] Of parents, in 2017, the full time employment rate of women was 60 percent across family types. Lone fathers' employment rate was 74 percent and for fathers living in a couple it was 80 percent. The overall greatest negative impact on employment upon becoming a parent is experienced by women. The EIGE Gender Equality Index 2019 Work Life Balance report noted in this regard, that, "the disproportionate weight of care duties on mothers limits their participation in or

[5] Shutes and Walker, "Gender and free movement: EU migrant women's access to residence and social rights in the U.K.", (2018), 44:1, *Journal of Ethnic and Migration Studies*, 137-153 at p.141.
[6] EIGE, "*Gender Equality Index 2019 Work-life balance",* cited *supra* note 1, p.37.
[7] European Commission, "*2018 Report on Equality Between Women and Men in the European Union*", p.12.
[8] See eg Hochschild and Machung, "*The Second Shift. Working families and the revolution at home*", (Penguin Books, 2012) and; EIGE, "*Gender Equality Index 2019 Work-life balance",* cited *supra* note 1, p. 47.
[9] Eurostat, "*Gender-employment gap",* (online data code tesem060), (Eurostat, 2017).
[10] EIGE, "*Gender Equality Index 2019 Work-life balance",* cited *supra* note 1, p. 33.
[11] EIGE, "*Gender Equality Index 2019 Work-life balance",* cited *supra* note 1, p. 91 – 95.

forces their withdrawal from the labour market."[12] Added to this is the in-work discrimination faced by women upon becoming a parent. For example, in the UK, three-quarters of women surveyed reported that they had a negative or possibly discriminatory experience during pregnancy, maternity leave, or upon return from maternity leave and, over one in ten mothers felt forced to leave their job.[13]

Related to the need to balance unpaid care responsibilities with paid work, employed women are more likely to work part-time. In 2018, 31 percent of women and 8 percent of men were in part-time work.[14] Whilst part-time work is a positive means of combining care and remaining in the labour market, part-time work is also one of the key factors contributing to the existing "gender pay gap".[15] Part time work is associated with lower earnings, poorer career progression and labour market segregation. [16] Currently, the gender pay gap persists across all Member States of the EU.[17] The cumulative effect of the gender gaps in employment rate and in pay means that the inequalities widen with age. Women face a "significant lifetime penalty" on account of their unpaid caring responsibilities, culminating in a large gap in pensions upon retirement. The gender pension gap, in 2017 was 37 percent, "a situation that will persist for decades to come".[18] Ultimately, these inequalities lead women to become more economically dependent upon their partners or the state which in turn increases the risk of poverty and social exclusion for women.[19]

The cumulative pressure on women needs to be placed in the context of the emerging "care crisis" and the anticipated demand for care in the future.[20] The

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[12] EIGE, "*Gender Equality Index 2019 Work-life balance",* cited *supra* note 1, p. 33.
[13] HM Government and Equality and Human Rights Commission, "*Pregnancy and Maternity Related Discrimination and Disadvantage First findings: Surveys of Employers and Mothers",* BIS Research Paper No. 235, (Crown copyright, 2015).
[14] EIGE, "*Gender Equality Index 2019 Work-life balance",* cited *supra* note 1, p.32.
[15] According to the definition used by the European Commission, the gender pay gap is the difference between average gross hourly earnings of male paid employees and of female paid employees as a percentage of average gross hourly earnings of male paid employees.
[16] See further, EIGE, "*Gender Equality Index 2019 Work-life balance"* cited *supra* note 1.
[17] EIGE, "*Tackling the gender pay gap: not without a better work-life balance*", (Publications Office of the European Union, 2019).
[18] EIGE, "*Gender Equality Index 2019 Work-life balance",* cited *supra* note 1, p.35.
[19] COM (2017) 252 final, "An Initiative To Support Work-Life Balance For Working Parents And Carers", 2010, *O.J. C 129,* p.5.
[20] Dahl, Keranen and Kovalainen, "Introduction", in Dahl, Keranen and Kovalainen (Eds.), *Europeanization, Care and Gender Global Complexities,* (Palgrave Macmillan, 2011), p. 9 – 12.

care crisis is characterised by the increasing demand for care and a decreasing supply of carers. The decrease in carers is explained in part by the growing number of women in paid work. The larger demand for care is due to the expanding elderly population, as life expectancy rises so too does the demand for care in later life. In 2016, across the EU, 29 percent of households did not have sufficient professional home-care services leading to the care being provided informally, largely by women of working age.[21] The European Commission predicts that the ratio of the population aged under 20 and over 65, the "age-dependency ratio" is expected to rise over the period 2013 – 2060 from 64.9 percent to 94.5 percent.[22] This puts immense pressure on the "sandwich generation" of caregivers, those who care for their elder parents and their own children simultaneously, the majority of whom are women.[23]

Care needs are growing. Meeting care needs is an essential part of life, "unpaid care work is the back-bone of thriving families, communities and economies".[24] Arguably, "care is at the heart of humanity", the experience of being cared for is universal, "all human beings are dependent on care, as both recipients and providers. Care is necessary for the existence and reproduction of societies and the workforce and for the overall wellbeing of every individual".[25] Care is an inevitable part of being human. However, whilst the need to be cared for is felt by us all, "cultural, ideological and legal structures" exist that mean that responsibility for care has been allocated to women.[26]

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[21] EIGE, "*Gender Equality Index 2019 Work-life balance",* cited *supra* note 1, pp. 81-84.
[22] This would mean that the EU would no longer have four working-age people for every person aged over 65 years and would instead have only two working-age persons, European Commission, "*The 2015 Ageing Report Economic and budgetary projections for the 28 EU Member States (2013-2060)*", European Economy 3,2015, (Publications Office of the European Union, 2015).
[23] Patterson and Margolis, "The Demography of Multigenerational Caregiving: A Critical Aspect of the Gendered Life Course", 2019, 5, *Socius: Sociological Research for a Dynamic World,* 1–19.
[24] UN Women, "*Unpaid care work: your daily load and why it matters*", https://www.unwomen.org/en/digital-library/multimedia/2020/5/explainer-unpaid-care-work-your-daily-load-and-why-it-matters ,(last visited, 2 November 2020).
[25] International Labour Office (ILO), "*Care work and care jobs for the future of decent work*", 2018, (International Labour Office, 2018), p.6.
[26] Fineman, "Care and Gender", in Ergas, Jenson, and Michel (Eds.) *Reassembling Motherhood: Procreation and Care in a Globalized World*, (Columbia University Press, 2017), Emory Legal Studies Research Paper, Available at SSRN: https://ssrn.com/abstract=3074641 , p.7.

The aim of this thesis

This thesis explores the contribution that the EU is making, through law and policy, to progress towards an equal sharing of unpaid care work between women and men. To do this, two overarching questions are posed. First, to what extent is unpaid care work visible in EU law and policy? Second, how far do the legal rights transform the gendered roles associated with unpaid care work, and how far do they entrench them?

Turning to the field of EU Social Policy. The EU institutions have been pursuing an initiative concerning unpaid care and gender equality for decades; the agenda of the "reconciliation of work and family life".[27] This agenda has been concerned with rights in the workplace and the reconciliation of professional and family life. And the EU has had a significant impact.[28] This thesis updates the large body of scholarship in this area with new observations concerning the evolution of the field. It adds to this an evaluation of the latest developments and contextualises these developments with insights from civil society organisations active in lobbying for reform of this field.

This thesis also explores the field of EU free movement of persons law where there is "almost a complete neglect of gender and intra-EU mobility research".[29] In analysing this field, this thesis scrutinises the free movement rights for the impact that they have on women with caring responsibilities when exercising their right to free movement and it draws attention to the need for more legal scholarship in this area.

The detailed desk-based study of these two fields is developed further through the analysis of interviews held with civil society organisations in Brussels and the UK who are active in the fields of EU Social Policy and free movement of persons' law. The interviewees discuss their experiences of seeking to enforce the legal rights on behalf of women with caring responsibilities and the impact that the rights have on

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[27] Rubio Marin, "The (dis)establishment of gender: Care and gender roles in the family as a constitutional matter", (2015), 13:4, *International Journal of Constitutional Law,* 787–818.
[28] COM (2017) 252 final, "An Initiative To Support Work-Life Balance For Working Parents And Carers", p.7.
[29] Ackers, Balch, Scott, Currie and Millard, "*The Gender Dimension of Geographic Labour Mobility in the European Union*", Report requested by the European Parliament's Committee on Gender Equality, 2009, p.7, available at < http://www.europarl.europa.eu/studies>, (last visited 21 August 2020).

the ground. They also discuss their experience in seeking policy and legal reform, either through lobbying the EU institutions or through case law at the national courts and through references to the Court of Justice of the EU ("ECJ"). These discussions are intended to draw out, *inter alia,* what institutional drivers and obstacles may exist that will influence progress, in the future, on gender equality and the equal distribution of unpaid care work as well as bringing a unique perspective to the doctrinal findings.

Driving the analysis of this thesis are the questions of how visible unpaid care work is in the legal framework and how transformative the rights are. By asking about the visibility of care this thesis investigates how far the gendered impact of care is acknowledged in the legal frameworks and ECJ jurisprudence. It also seeks to get behind the law books to explore whether the gendered impact of care forms part of the political debate amongst relevant actors, including *un*official political debate such as amongst civil society organisations, and official political debate at the level of the EU institutions. By asking about the transformative quality of the legal rights in force, this thesis evaluates the extent to which the legal rights transform the existing gendered models and stereotypes associated with unpaid care or whether the legal frameworks entrench them. Theoretically, these questions, which are discussed fully in Chapter 2, are underpinned by the scholarship of Nancy Fraser.

Through the innovation of studying the fields of EU Social Policy, and EU free movement of persons law together, and evaluating the visibility of unpaid care and the transformative quality of the rights in the legal and policy discourse, this thesis adds breadth and depth to discussions on gender, care and EU law revealing where there are similarities, shared challenges, and contradictions between these two fields. Crucially, this thesis is able to draw out and identify internal dissonance within the EU's approach to promoting and preserving gender equality, and this approach enables the notable advancement of the scholarship on care, gender equality and EU law. As such, it also, provides a significant platform for the EU and civil society actors to respond to the internal dissonance and inconsistencies in approach to and understanding of the connection between care, gender and EU law, in these two fields.

Finally, before discussing the structure of this thesis, the UK vote to leave the EU will be briefly remarked upon, in particular the relevance it has for the selection of interviewees based in the UK as well as the research project more broadly. The decision to interview civil society organisations based in the UK was made before the UK vote to leave the EU ("Brexit"). The UK formally left the EU on the 31 December 2020 shortly before the conclusion of this research project in January 2021. Until 31 December 2020, and so throughout the period that this research was undertaken, EU law remained in force in the UK. Therefore, Brexit did not disrupt the investigation of the research questions as they have been outlined. For example, the UK interviewees were able to discuss the operation of the EU rules in force, the impact that the rules have on the ground and their experience of engaging in EU law and policy reform. However, despite not being directly implicated in the research, Brexit cast a shadow over the project. This was especially true for the field of EU Free Movement of Persons because this area of law and policy was highly politicised during the referendum campaign, those campaigning for the UK to leave the EU focused heavily on anti- EU free movement rhetoric and this is regarded as having had a major impact on the referendum outcome.[30] In Brussels, interviewees talked about the chilling effect that the Brexit vote had on legislative activity. [31] They said that legal and policy activity slowed down whilst the EU institutions and governments of the Member States absorbed the shock of the vote and took stock. In practical terms the analysis of the Free Movement of Persons rules in this thesis explores the inequality that is perpetuated by the legal framework and how the structure and interpretation of the rules can inhibit the access of women with caring responsibilities to EU law rights and protections. The reality of this inequality will be felt acutely in the UK when Union citizens' post-Brexit will have to evidence their prior lawful residence in order to qualify for settled or pre-settled status under the UK government's EU Settlement Scheme.[32] Therefore, whilst Brexit is not the focus of this research,

[30] See eg D Cameron (UK Prime Minister during the referendum campaign), Letter to the *Financial Times* 26 November 2013 and; D Cameron, Letter to the *The Daily Telegraph* 15 March 2014.
[31] See discussion in Chapter 5.
[32] The UK government has implemented, the EU Settlement Scheme, a system that allows Union citizens and their family members who are already living in the UK to retain their residence rights: Immigration Rules Appendix EU: EU, other EEA and Swiss citizens and family members.

and nor has Brexit disrupted the integrity of the research questions, the findings of this thesis are extremely significant for the UK context and for Union citizens' rights in the UK post-Brexit.

Thesis structure

This thesis is organised into six chapters. This Introduction is followed by the second chapter, entitled "The Research Framework: Theory and Methods". Chapter two sets out the theoretical approach that has informed the research, namely, the Ethic of Care. It also explains the theoretical positions that underpin the two key research questions which structure the research. As mentioned above, these questions are firstly, to what extent is unpaid care work visible in EU law and policy? Secondly, how far do the legal rights transform the gendered roles associated with unpaid care work, and how far do they entrench them? It then explains the socio-legal research methods used and details the processes involved in conducting the research interviews.

The third chapter is entitled "EU Social Policy: Reconciliation of Professional and Caring responsibilities". This chapter focuses on the evolution of the policy concerning the reconciliation of professional and family life which sits within the broader field of EU Social Policy. In doing so it considers the visibility of unpaid care in the policy discourse. It notes how the field is shaped by the coinciding objectives of economic growth and gender equality and considers how unpaid care work came to be a concern of the EU institutions. It scrutinises the latest developments, including the EU Commission's "Initiative to Support Work-Life Balance for Working Parents And Carers" and it evaluates the potential of the Work Life Balance Directive 2019/1158 to contribute to the transformation of the gendered roles associated with unpaid care work.[33]

The fourth chapter is entitled "Care on the Move – Care, Free Movement and Union Citizenship". This chapter discusses the legal framework governing the free movement of persons. It is organised into themes which allow the free movement

[33] COM (2017) 252 final, "An Initiative To Support Work-Life Balance For Working Parents And Carers" and; Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive, 2010/18/EU, *O.J. L 188, 12.7.2019,* pp. 79–93.

of persons rules to be examined from the perspective of how they impact women with caring responsibilities whilst they reside in another Member State. The themes look at the impact of the rules when, firstly, women are full time carers, secondly, when women combine paid work with unpaid care and, thirdly, how the family rights within Directive 2004/83, the "Citizens' Rights Directive and case law support women when they have caring responsibilities. This chapter provides a structured analysis of the extent to which unpaid care is visible in the legal discourse and whether the rights transform or entrench the gendered roles surrounding unpaid care work.

The fifth chapter is entitled "The Stakeholder Context". This chapter builds on the doctrinal studies conducted in chapter three on EU Social Policy, and chapter four on EU free movement of persons law and presents the empirical research conducted as part of this thesis. The interviewees were representatives from civil society organisations who are active in either the field of EU Social Policy or EU free movement of persons' law. They have experience of how the rules operate in practice and experience of seeking legal reform via the EU institutions. Interviewees discuss how visible they perceive issues surrounding unpaid care work to be in EU law and policy. They discuss their experience of how the rights in their respective fields impact upon women with caring responsibilities. They express their views on whether the rights in each field have the potential to contribute to the transformation of the gendered roles associated with unpaid care work or whether they entrench gender stereotypes. And finally, interviewees discuss how the respective fields have evolved, what has influenced progress and what has hindered it, and what scope there is for progress on the fairer allocation of unpaid care work, in the context of EU law, in the future. This chapter explores further the two distinct narratives that emerge from the previous chapters concerning on the one hand EU Social Policy and on other hand, EU free movement of persons' law.

The sixth chapter is the conclusion. This chapter will make concluding remarks by bringing together and reflecting on the findings of the previous chapters, including the different narratives of care that emerge from EU Social Policy and EU free

movement of persons law, before considering the significance of this research and the contribution that it makes.

Chapter 2 The research framework: theory and methods

Introduction

The focus of this thesis is the relationship between gender, care and EU law. It is driven by a concern for gender equality. The aim of this research is to assess how the EU is responding, in law and policy, to the gendered impact of the unequal distribution of unpaid care work, and how far the EU is advancing gender equality, in this context. This chapter presents the research framework underpinning this thesis, it sets out the theoretical positions that have informed the research and that have shaped the two overarching research questions, concerning the visibility of unpaid care and the transformative potential of legal rights. Finally, it explains the socio-legal research methods that have been employed.

Before discussing these two aspects, there are three preliminary comments that are important to make. Firstly, a comment on the context in which unpaid care work takes place. Secondly, a reflection on the importance of having an outlook that appreciates the intersectional experiences of care work and of women. Thirdly, a brief review of mainstream liberal ideology, so far as it is relevant to unpaid care work and to the theoretical approach that is taken in this thesis.

Preliminary Comments

The context of care work

Care in this thesis refers to care that is unpaid and that takes place informally between people in familial or kin relationships. Empirically, the majority of this care consists of women caring for children, ill, elderly or disabled spouses, parents or other family members, including in non-heterosexual families.[34] Analysed in this thesis, are the policy, rights and discourses that surround unpaid care. The focus is on how unpaid care is accounted for in law and how this affects women. However, it is acknowledged, here, that caregiving work takes place in a range of contexts beyond what is considered in this thesis. Care work is now undertaken by a range

[34] Eurofound, "Striking a balance: Reconciling work and life in the EU", 2018, Luxembourg: Publications Office of the European Union, available at: <https://www.eurofound.europa.eu/publications/report/2018/striking-a-balance-reconciling-work-and-life-in-the-eu> (last visited 2 September 2020);

of actors including the state, voluntary organisations, and private companies. Matters arising include questions of quality control, consumer choice, profit and low pay, or welfare as well as questions about state dependency. Furthermore, global "care chains" have developed whereby migrant workers, usually women, move from poorer countries to take up caring jobs in richer countries. [35] These contemporary social processes of care work intersect with a range of inequalities including gender, race, ethnicity, class, and migrant status. The unpaid care work that is considered in this thesis forms part of this wider, global context of caregiving work. This research, whilst it is focused and has a defined scope, proceeds with an acknowledgement of this broader context and with an awareness of the many contemporary factors that shape how we view care work, how it is managed and how responsibility for care is allocated.

Reflecting on the intersectional experiences of care work and of women

Related to this broad context of care work is the importance of taking an intersectional approach when referring to caregiving work and women's experience. Throughout the research, it has been important to be reflective and cautious in this respect. "Care" and "women's experience" are broad concepts and there is a risk that they give the impression of a uniformity that overlooks the diverse and intersectional experiences of individuals. For example, when thinking about care, the experiences of elderly spouses looking after one another will be different from a child who is caring for a parent, or, from the caring needs of someone with a disability or, from the dependency of an infant child. Different needs will be present and different concerns will arise. The issues may be varied, and it is important to remain mindful of the differences within unpaid care work. [36] As such, this research was conducted with a curiosity about whether certain kinds of caring relationships are more conspicuous and privileged in law and whether others are marginalised.

The issues facing women with caring responsibilities are, similarly, diverse. Women's experience will be impacted by for example, their age, race, ethnicity,

[35] Dahl, Keranen, Kovalainen (Eds.), "*Europeanization, Care and Gender Global Complexities*", (Palgrave MacMillan, 2011).
[36] See further, Herring, "*Caring and the Law*", (Hart, 2013), pp. 25-26.

class, sexual orientation, level of poverty, the presence of a disability, migration status, employment status or the formation of their family. Therefore, it is important to resist taking an "essentialist" position and basing analysis on a singular idea of women's experience. Instead, in this thesis, when discussing the people to whom the legal rights apply, (rather than the specific legal norms) there is an acknowledgement that various factors impact women's experience. To do this involves considering, which groups of women would be advantaged, and which groups disadvantaged by a policy or legal rule?

Liberal ideology and unpaid care work

The final preliminary point concerns the theoretical context of this research. The purpose of this chapter is to present the theoretical perspectives that inform this thesis. They are feminist and ethic of care approaches. These approaches have been pursued by scholars to, amongst other things, critique, develop, reconceptualise, or provide an alternative to the mainstream liberal tradition.[37] Therefore, when the feminist and ethic of care approaches are discussed later in this chapter, certain features of mainstream liberal ideology are referred to. This later discussion would benefit from a short exploration of the relevant elements of liberal ideology, at this stage. Discussed in this section is, the concept of the dichotomy between the public and private spheres of life and the place that unpaid care has within the dichotomy, and the liberal valorisation of personal autonomy.

The dichotomy between the public and private realms of life is "one of the 'grand dichotomies' of western thought".[38] It has origins in the Classical tradition and in the Liberal tradition. Its influence has been far reaching, incorporated into not

[37] Eg Fineman, "*The Autonomy Myth: A Theory of Dependency*", (New Press, 2004); Fraser, "After the Family Wage: Gender Equity and the Welfare State", 22(4), *Political Theory*, (1994), pp. 591-618; Held, "*Feminist Morality Transforming Culture, Society and Politics*", (University of Chicago Press, 1993); Kittay, "*Love's Labor. Essays on Women, Equality, and Dependency*", (Routledge, 1999); McKinnon, "*Towards a Feminist Theory of the State*" (Harvard University Press, 1989); Okin, "*Justice, Gender and the Family*" , (Harper Collins, 1989); Olsen, "The Family and the Market: A Study of Ideology and Legal Reform", 96(7), *Harvard Law Review,* (1983), 1497-1578; Pateman, "*The Sexual Contract*", (Stanford University Press, 1988); Sevenhuijsen,"Citizenship and the Ethics of Care: Feminist Considerations on Justice, Morality and Politics", (Routledge, 1998); Tronto, "*Moral Boundaries A Political Argument for an Ethic of Care*", (Routledge, 1994), Walker, "Mother Time. Women, Aging, and Ethics", (Rowman & Littlefield, 1999).

[38] Squires, "Public and private", p.131, in (Eds. Bellamy and Mason), *Political Concepts,* (2003, Manchester University Press).

only, theoretical scholarship but also social and institutional arrangements such as marriage, welfare and employment rights and has become a deeply embedded feature of Europe's constitutional culture.[39] The treatment of care work within the dichotomy has meant that it has also had a profound impact on how the responsibility for unpaid care work has been socially allocated.[40] The Classical approach defines the public sphere as involving political life, and the private sphere to be that of domestic life, involving the work of care and social reproduction, which was carried out by women or slaves. The Liberal approach defines the public sphere as the governmental sphere and regards the private sphere to be the market, a realm that involves private voluntary relations between individuals of which state interference is unsuitable.[41] Over time, the Classical dichotomy has infused the Liberal distinction and the divisions have become blurred, incorporating the state, civil society, the market and the personal realms of life, but what has remained constant is that unpaid care work has been privatised and largely hidden.[42]

Feminists, in their critique of the public-private dichotomy, have framed the private realm as the home, involving domestic and unpaid care work, and the public realm to represent everything else: the state, the market and civil society.[43] Relating the dichotomy to the experience of women, they note that there is a gender order present in the dichotomy whereby women have been installed in the private sphere and have been assigned responsibility for care and social reproduction.[44] Furthermore, they establish that this gender order creates and perpetuates gender inequality. They argue that the Classical influence, is one where the dichotomy creates inequality between the two spheres. Where the matters of the political, public sphere are regarded as virtuous, and superior to the work of women and slaves in the domestic, private sphere.[45] They argue that

[39] Olsen, op. cit. *supra* note 37; Lewis, "The Decline of the Male Breadwinner Model: Implications for Work and Care" *Social Politics* 8:2 (2001), 152; Okin, op. cit. *supra* note 37; Pateman, op. cit. *supra* note 37; Rubio Marin "The (dis)establishment of gender: Care and gender roles in the family as a constitutional matter", 13 *International Journal of Constitutional Law,* 787-818.
[40] Olsen, op. cit. *supra* note 37, Tronto, op. cit. *supra* note 37.
[41] Squires, op. cit. *supra* note 38.
[42] Olsen, op. cit. *supra* note 37; Squires, cited *supra* note 38.
[43] Squires, op. cit. *supra* note 38.
[44] Olsen, op. cit. *supra* note 37; Squires, op. cit. *supra* note 38.
[45] Squires, op. cit. *supra* note 38.

the Liberal approach, by not including the domestic realm within its scheme, completely diminishes the work of the domestic sphere of life to the point that social reproduction, and care for family and dependants is not acknowledged as a component part of society. Feminists argue that this theoretical outlook creates and sustains gender inequality.

Women now increasingly inhabit both the public and private spheres of life but the pervasiveness of the dichotomy means that assumptions remain about the family and unpaid care work.[46] There is still a sense that responsibility for the family and care for dependants belongs to women and that the family is something distinct and private.[47] The dichotomy has become a "structure of consciousness" which feminists argue has led to a shared understanding of the social world, one which has accepted the dichotomy. This understanding, Frances Olsen writes, shapes, "a society's culture and also shapes the society's view of what social relationships are 'natural' and, therefore, what social reforms are possible".[48] And it has led Carol Pateman to say, that the dichotomy of the public and private spheres of life is, "ultimately, what the feminist movement is about".[49]

A further element of mainstream liberal thought that is relevant to the place and value of unpaid care work is the paradigmatic liberal notion of autonomy. Autonomy underpins the liberal concept of personhood. Feminists and ethic of care theorists respond to this concept in their scholarship, for, *inter alia*, how autonomy relates to care, dependency and women.[50] Autonomy, in this context, is epitomised by the person who is, "self-sufficient, independent, and self-reliant, a self-realizing individual who directs his efforts towards maximising his personal gains."[51] It promotes an individualistic ideal and one that feminists argue "is biased toward male social roles".[52] Whilst there is some variation within liberal thinking about how autonomy is understood, feminist and ethic of care theorists

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[46] Olsen, op. cit. *supra* note 37.
[47] Olsen, op. cit. *supra* note 37; Squires, cited *supra* note 38.
[48] Olsen, op. cit. *supra* note 37.
[49] Pateman, "Feminist Critiques of the Public/Private Dichotomy", in (Eds. Benn and Gaus, 1983), *Public and Private in Social Life,* p. 281.
[50] Friedman, "*Autonomy, Gender and Politics*", (Oxford Scholarship Online, 2006).
[51] Code, "Second Persons" in Code, "*What Can She Know? Feminist Theory and the Construction of Knowledge",* (Cornell University Press, 1991), pp. 77-78.
[52] Friedman, op. cit. *supra* note 50.

identify a tension between the notion of autonomy and the idea that we exist in a social context with one another.[53] They argue that the principle of the autonomous citizen fails to acknowledge the "importance of interpersonal relationships in sustaining everyone's life" and excludes the responsibility to care for dependants from the image of the normative individual. And furthermore, that it obscures the personal dependencies and the need for care that arise for each of us throughout the life cycle.[54] As such, not only is it related to male social roles, it is not a "neutral description of human nature; rather it is part of a discourse that constructs individuals in this image".[55]

Feminists and ethics of care scholars similarly argue that the public-private dichotomy is a social construct. Tronto writes about the importance of recognising that the associations surrounding the public private dichotomy are, outcomes of "an historical process, and not the result of biologically essential facts nor a necessary result from change in social structures".[56] James writes that the dichotomy is socially and politically constructed and can, therefore, be deconstructed.[57] Whilst some feminists argue that the dichotomy itself need not be dismantled, there is convergence in feminist and ethic of care theory that the gender order that supports the dichotomy needs to be overcome before gender equality can be realised.[58] The next section will explore the theoretical positions that focus upon and elevate relationships of dependency, human vulnerability, and women's role in caregiving and social reproduction. And it will also set out the theoretical frameworks that support the analysis of EU law and policy in this thesis.

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[53] Nedelsky, "Reconceiving Autonomy: Sources, Thoughts, and Possibilities, *Yale Journal of Law and Feminism* 1 (1989), 71-109 at 21; cf Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press, 1988), p.8.
[54] Fineman, op. cit. *supra* note 37; Friedman, op. cit. *supra* note 50 at 82; Nussbaum, "*Hiding from Humanity*", (Princeton, University Press, 2004), p. 340.
[55] Squires, op. cit. *supra* note 38 at p.133.
[56] Tronto, op. cit. *supra* note 37 at p.56.
[57] James, "*The Legal Regulation of Pregnancy and Parenting in the Labour Market*", (Routledge-Cavendish, 2009), Chapter 1.
[58] Squires, op. cit. *supra* note 38.

Theoretical discussion

To analyse the discourse and rights contained in EU law and policy for its impact on unpaid care work, this thesis poses two principal questions that have already been mentioned, they are firstly, to what extent is unpaid care work visible in EU law and policy? Secondly, how far do the legal rights transform the gendered roles associated with unpaid care work, and how far do they entrench them? This section will focus on these two questions and explain the areas of scholarship that have informed them and influenced the outlook of this thesis. Firstly, the overall orientation of this thesis which is influenced by a feminist ethic of care will be discussed. Secondly, Nancy Fraser's article, 'Struggle over Needs: Outline of a Socialist Feminist Critical Theory of Late Capitalist Political Culture" and the "politics of needs recognition" that she advances here will be set out. This article specifically informs the question asked by this thesis about the visibility of unpaid care in EU law and policy.[59] And thirdly, Nancy Fraser's article, "After the Family Wage: Gender Equity and the Welfare State" where she articulates her visions of "gender equity" and of an "ideal universal care giver society" will be explained. This work underpins the second question of this thesis, which focuses on the transformative quality of rights in EU law.[60]

The Ethics of Care

Turning first to the ethics of care. The ethics of care is based on the outlook that relationships of dependency between people are a fundamental and essential part of life. Arising from these relationships of dependency is the responsibility to care. Important to care ethicists' is how this responsibility is allocated, to whom and by whom. By presenting people as being part of interdependent relationships of dependency and care, the ethics of care provides a counterpoint to the mainstream liberal account of autonomous individuals. This approach also appeals to feminists who can connect it with the lived experience of women. The main tenets of the ethic of care and the relevance of the ethic of care to this research, are best understood through exploring the evolution of this field of thought. There

[59] Fraser, "Struggle over Needs: Outline of a Socialist Feminist Critical Theory of Late Capitalist Political Culture" in Fraser, *Unruly Practices, Power, Discourse and Gender in Contemporary Social Theory*, (University Press of Minnesota, 1989).
[60] Fraser, op. cit. *supra* note 37.

are two significant milestones in the evolution of the ethics of care and a possible third one is emerging. The first is the work of Carol Gilligan, in the 1970s, largely understood to form the foundation of the ethics of care. Secondly, in the 1990s, the ethics of care was developed into a political theory, advanced by amongst others, Joan Tronto. Most recently, care ethics scholars have begun to re-think the concept of dependency and to relate it to vulnerability theory as conceived by Martha Fineman. These three milestones will be explored here.

Carol Gilligan's work, "In A Different Voice", is considered to mark the origins of the ethic of care.[61] Her seminal work challenged the position in developmental psychology, as developed by the work of Lawrence Kohlberg, that women had a less evolved moral development than men. She proposed that instead, there are differences in the moral frameworks of men and women. [62] She found that whilst, as presented by Kohlberg, men's moral frameworks are guided by a notion of rights and rational argument, women were speaking in a "different voice". She found that women's moral frameworks are driven by an attention to their responsibilities and personal connections and with a sensitivity to individual circumstances. The responsibility that she found to be present in women's moral outlook, flowed from obligations arising from relationships of dependency and care. This contrasted with the predominant idea of morality as based on principles of rights and justice.

Gilligan's work had significance beyond the field of developmental psychology because philosophers found that the 'different voice' proposed an alternative moral framework. This has led to the ethic of care becoming a distinct approach within moral philosophy. The ethic of care was regarded as encompassing,

> A vision of human relationships and of society grounded upon the primacy of human connectedness, wherein care and compassion are seen as fundamental and where emotions, peaceful co-operation, empathy, friendship and

[61] Gilligan, "*In a Different Voice",* (Harvard University Press, 1982).
[62] Gilligan, op. cit. *supra* note 61 at 18; Robinson, "Care Ethics and Transnationalisation of Care" in Mahon and Robinson (Eds.) *Feminist Ethics and Social Policy Towards a New Global Political Economy of Care* (UBC Press, 2011), at p.132.

> responsibility are aspired to rather than universal, abstract, rational principles (autonomy, freedom, justice, equality and rights).[63]

However, the ethic of care did not initially connect with law reform and legal feminists until the 1990's when Joan Tronto and others, argued for the public significance of the ethic of care. [64] The ethic of care had largely been concerned with personal relationships of dependence. It was now argued that care should have public value and support and should not be considered along binary gender lines. This, they argued, was because care is an unavoidable and universal part of life. Further, that it is necessary for human well-being and to sustaining and reproducing society.[65]

Eva Fedder Kittay described the ubiquitous and universal nature of care and dependency and contrasted it with the mainstream liberal notion that we are autonomous. She said,

> My point is that this interdependence begins with dependence. It begins with the dependency of an infant, and often ends with the dependency of a very ill or frail person close to dying. The infant may develop into a person who can reciprocate, an individual upon whom another can be dependent and whose continuing needs make her interdependent with others. The frail elderly person… may herself have been involved in a series of interdependent relations. But at some point, there is a dependency that is not yet, no longer an interdependency. By excluding this dependency from social and political concerns, we have been able to fashion the pretence that we are independent – that the cooperation between persons that some insist is interdependence is simply the mutual (often voluntary) cooperation between essentially independent persons.[66]

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[63] Drakopoulou, "The Ethic of Care, Female Subjectivity and Feminist Legal Scholarship", 8 (2000) *Feminist Legal Studies,* 199- 226.
[64] Tronto, op. cit. *supra* note 37 and; Sara Ruddick, "Maternal thinking: Towards a Politics of Peace", (Beacon Press,1989); Sevenhuijsen, op. cit. *supra* note 37.
[65] Held, "The Ethics of Care: Personal, Political, Global", (OUP 2006); Kittay, op. cit. *supra* note 37.
[66] Kittay, op. cit. *supra* note 37.

Through increasing the visibility of the continuous, diverse, daily acts of caring, care ethicists sought to challenge the concept of care as sentimental, private and attached to ideals of womanhood.[67] Sevenhuisen describes it as a "counterbalance" to the "constantly recurring tendencies to romanticize and privatize care, and to link it with symbols and norms of femininity".[68] Presenting care as a universal concern Sevenhuisen argues that an ethic of care should be an important part of citizenship (rather than a counterpoint to justice) where care is seen as a social process engendering important elements of citizenship.[69]

Tronto discusses how care may influence our public democratic practices. Care is a political concept, writes Tronto, through which we can make judgements about the public world, "care helps us rethink humans as interdependent beings…". [70] Certain feminists recognised the significance of bringing "care" both as a set of values and a type of work out of the private sphere. They viewed this not as a transfer from the private sphere to the public sphere but as contributing to the deconstruction of gendered dichotomies. [71] At this time, a critical feminist approach to the ethics of care also began to develop. A feminist ethics of care "does not valorize caring relations or caring values as either intrinsically morally superior or more desirable based on their 'femininity'".[72] Rather, care in these terms, is an analytical lens through which to make "situated judgements about collective commitments and individual responsibilities",[73] one that recognises power and degrees of agency and encourages a democratic pluralistic politics. This conceptualisation of the ethic of care recognises us all as "interdependent and as having potential and responsibility to be caring and cared for".[74] It is also committed to understanding how power works in the context of care, how it may

[67] Tronto, op. cit. *supra* note 37; Sevenhuijsen, op. cit. *supra* note 37.
[68] Sevenhuijsen, op. cit. *supra* note 37 at p. 185.
[69] Williams, "In and beyond New Labour: towards a new political ethics of care", 21(4), (2001), Critical Social Policy, 467–493 at p. 477.
[70] Williams, op. cit. *supra* note 69.
[71] Robinson, op. cit. *supra* note 62 at pp. 128-129.
[72] Robinson, op. cit. *supra* note 62 at pp. 128-129.
[73] Williams, op. cit. *supra* note 69 at p. 478.
[74] Williams, op. cit. *supra* note 69 at p. 478.

lead to the exclusion or suffering of particular groups of people and how that power is maintained.[75]

Most recently there has been debate by some ethic of care scholars about the relationship between Martha Fineman's concept of vulnerability and the notion of dependency in the ethic of care. [76] Some make the case for broadening the scope of dependency to capture Fineman's conception of vulnerability.[77] Fineman has not applied her approach to the ethic of care, nor have the care ethicists been explicit about drawing on Fineman's work. Nevertheless, connections are being made that may lead to the ethic of care developing further as a political theory.[78]

Fineman's definition of vulnerability is broader than the notion of dependency. Dependency challenges the version of the liberal citizen, one who is autonomous and independent, and dependency reflects an important part of the human experience. However, Fineman suggests that the notion of dependency gives the impression of being "transitory and episodic".[79] As such dependency can be treated as a phase that individuals pass through before becoming or returning to being a normative liberal individual. Dependency risks being treated as peripheral to politics.[80] The structure of the public and private domains is still relevant for many theorists, she writes, and dependency and care can still be presented as personal matters and private responsibilities.[81] Vulnerability on the other hand is orientated slightly differently. Vulnerability is a state of constant possible harm. It is a state that is universal to everyone even the most independent and autonomous of us. It therefore resists being separated into a matter for the private realm. It is

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[75] Robinson, op. cit. *supra* note 62 at pp. 128-129.
[76] Engster, "Care Ethics, Dependency, and Vulnerability", 13(12), (2019), *Ethics and Social Welfare,* 100-114.
[77] Engster, op. cit. *supra* note 76 refers to: Ferrarese, "The Vulnerable and the Political: On the Seeming Impossibility of Thinking Vulnerability and the Political Together and Its Consequences", (17) (2016) *Critical Horizons,* 224–239; Laugier, "Politics of Vulnerability and Responsibility for Ordinary Others", (17) (2016) *Critical Horizons*, 207–223; Vaittinen, "The Power of the Vulnerable Body: A New Political Understanding of Care", (17) (2015) *International Feminist Journal of Politics,* 100–118.
[78] Engster, op. cit. *supra* note 76 at p.101.
[79] Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition", 20 (1), (2008) *Yale Journal of Law and Feminism,* Article 2 at 11 cited in Engster, op. cit. *supra* note 76 at p. 101.
[80] Fineman, op. cit. supra note 79 at 11 cited in Engster, op. cit. *supra* note 76 at p. 101. (Engster p101); Fineman, "The Vulnerable Subject and the Responsive State." (60) (2010) *Emory Law Journal*, 251–275.
[81] Fineman, "The Vulnerable Subject and the Responsive State." (60) (2010) *Emory Law Journal*, 251–275 at 266 cited in Engster, op. cit. *supra* note 76 at p.101

a central fact of life and it is a significant reason why political institutions were created and therefore an established justification for state intervention.

Vulnerability includes a wider range of harms or needs than captured by dependency. Fineman explains,

> The analysis begins with the insight that vulnerability is inherent in the human condition and, further, that when our vulnerability is realized, we may become dependent— economically, socially, psychologically, and physically. Vulnerability comes partly from our materiality, our embodiment, and, as such, it is both universal and constant. Our bodily vulnerability is apparent at the beginning of life when we are totally dependent on others for our survival. But vulnerability in the sense in which I am developing it accompanies us continuously throughout life, as we age, become ill, disabled, or need care from others, and, finally, die. But a vulnerability analysis does not depend on the image of a dependent individual. Even fully realized and functioning adults remain vulnerable to external, "natural" forces, such as the environment or climate, which may inflict bodily harms. In addition, it is significant that a great deal of our vulnerability, whether of a physical, a nature-related, or a societal form, is beyond our control as individuals. Some vulnerabilities we cannot even anticipate, let alone protect against. Vulnerabilities also may be beyond the capacity of society and its institutions to eliminate completely. Vulnerability, as I am theorizing it, extends beyond the body, with its interior weaknesses and fallibilities.[82]

For Fineman, institutions and specifically law play a role in the potential to build resilience to vulnerability. They do so through regulation, entitlements, or other methods, and including in the contexts of "the family, the corporation, or the market more generally".[83]

There are two ways in which the vulnerability approach might usefully advance the ethics of care. It provides a more expansive recognition of context and facets of care, and it strengthens the case for state responsibility. Integrating vulnerability

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[82] Fineman, "Care and Gender", in Ergas, Jenson, and Michel (Eds.), *Reassembling Motherhood: Procreation and Care in a Globalized World,* (Columbia University Press, 2017), p.19.
[83] Fineman, op. cit. *supra* note 82.

into the ethics of care means thinking about care as everything that is done to respond to and build resilience against unwanted harms, ills, loss, or other crises or needs. So, dependency relationships are still relevant, but a vulnerability approach ensures that the caring within a dependency relationship includes the full context of care. This would be the practical tasks associated with caring as well as the range of activities that attend to the well-being of the people involved and to the kind of good care that anticipates vulnerability. This can be illustrated in the context of the vulnerability of a care giver.[84] Whereas in a care giver, child relationship the dependency or vulnerability of the child is undisputed, the "derivative dependency" or vulnerability of the care giver can be overlooked. [85] To be able to care, care givers become dependent on resources and are vulnerable to their needs being neglected. It does not necessarily mean that they become dependent, but they may be specifically vulnerable to for example, domestic violence or lower pay.[86] Responding to the care giver's vulnerability, would be caring within the vulnerability paradigm.

The objective of Fineman's vulnerability approach is to stimulate a responsive state, one that can build resilience and respond to vulnerabilities. In terms of influencing the ethic of care, taking a vulnerability approach to the understanding of care and dependency is a further entrenching of the idea that vulnerability, care and dependency are at the heart of the human condition. It is a further step towards shifting the association of care away from the private sphere, and ultimately dismantling the gendered order of the public and private spheres. The intention is that it will lead to human vulnerability and care becoming central to state responsibility.

In summary, an aim of this research is to evaluate the extent to which care is acknowledged in EU law and policy discourse. The issues that arise from the ethic of care have influenced the perspectives taken in this research. These include the view that care, dependency and vulnerability are fundamental and unavoidable aspects of the human condition, throughout the lifecycle. Rather than being independent and autonomous, we are all interdependent and connected through a

[84] Engster, op. cit. *supra* note 76 at p.108.
[85] Fineman, op. cit. *supra* note 82.
[86] Fraser, op. cit. *supra* note 37; Moller Okin, op. cit. *supra* note 37.

web of relationships. Furthermore, care is necessary to sustaining human life, society, and its institutions. As such care is of public significance, rather than being a privatised matter associated with ideals of womanhood. And as such, responsibility for care ought to be a matter for state intervention. As this thesis proceeds to evaluate how care features in EU law and policy, these perspectives, drawn from the ethic of care, have informed the overall orientation of analysis. In the following section, the framework for questioning and evaluating the visibility of care in EU law and policy is explained.

The visibility of care in EU law and policy and the "Politics of Needs Recognition"

Turning secondly to Nancy Fraser's "politics of needs recognition". Fraser's essay, "Struggle over Needs: Outline of a Socialist Feminist Critical Theory of Late Capitalist Political Culture", drives the approach taken, in this thesis, to the question of how visible unpaid care is, in EU law and policy. [87] In this essay Fraser argues that when analysing policy, we should be re-directing our focus from how needs are met to how needs are interpreted in the first place. Fraser argues that in late capitalist political culture, a debate about needs, especially health and social welfare needs, has become a distinctive feature of political discourse. Dominating these debates is whether needs will or will not be met. Fraser argues that this focus accepts needs as predefined and it deflects attention away from how those needs are interpreted. It deflects attention from questions such as, who interprets the needs and in light of what interests? And, what kinds of social structures underpin assumptions surrounding these needs? This is important because the interpretation and definition of needs significantly influences whether and how a measure is implemented that can fulfil or manage those needs.

Fraser advocates for the critical analysis of the processes involved in what she refers to as the "politics of needs". There are three distinct but interconnected moments to consider. Firstly, the process of establishing or denying the political status of a given need. This process in and of itself has the ability to "de-naturalise" a need. It means that a need is claimed as deserving of political attention, this makes a need visible and brings it out of the areas of life that are

[87] Fraser, op. cit. *supra* note 59.

assumed to be private or “natural”. This is particularly relevant for example, for unpaid care work which has historically and theoretically been regarded as a private matter and the natural role of women. The second moment concerns the processes involved in interpreting the need, in negotiating for the power to define the need and therefore in determining what would satisfy it. The third moment concerns the struggle over the satisfaction of the need and whether and how it should be satisfied.

Fraser writes, that related to the process of establishing a need as worthy of political intervention are the social boundaries between the concepts, related to the public private-dichotomy, of the “political”, “economic”, and “domestic” spheres of life. The boundaries between these concepts are not fixed and can be contested. When a need or activity is deemed to be within the economic or domestic sphere it is regarded as a private matter and is de-politicised. Such as the view that unpaid care work is the private responsibility of the domestic sphere. This privatisation enclaves the need and shields it from general scrutiny and contestation. Needs can move from these private spheres to become political. In this way they become visible. Fraser distinguishes between being “official political” and being “discursive political”. Official political is political in the institutional sense and is when a matter is handled directly by the institutions of government including for example parliaments and the administration. What becomes “official political” is a contested issue. It is not fixed and can begin with non-state actors campaigning on something that was until then “private”. Discursive political is when a matter is politicised through debate across diverse discursive arenas and a range of different public actors and interlocutors. These actors are not “official” in as far as they are non-state actors, are made up of a range of “publics” and include civil society. Fraser writes that, according to democratic theory, and to an extent practice, a matter does not become the subject of official state intervention before it has become visible as a politicised matter amongst these unofficial publics. For a need to become visible to law and policy makers, it therefore must first, cross the boundary from the private realm and go through a process of becoming politicised and discussed widely, before becoming officially political, where then, measures may be taken by governmental institutions, to meet the need.

Related to the process of defining and interpreting a need is the question of how to distinguish between better from worse "interpretations of needs". It is difficult to determine which interpretation of the need is the rightful interpretation. To do so, Fraser argues that there should be a consideration of the processes involved in the production of competing interpretations and consideration of the consequences of that interpretation. This includes evaluating the processes of interpretation for how democratic, equal, and fair they are. This may be about asking whether the various groups who seek to offer interpretations are inclusive or exclusive in their membership. Or, how hierarchical or egalitarian the different actors are. For example, through questioning the composition of an interest-based civil society organisation or alliances of such organisations. Consequential considerations include comparing the different outcomes attached to each proposed interpretation and asking whether an outcome would disadvantage some groups of people. It also includes asking whether an outcome reinforces or challenges existing models of dominance and subordination. Such as gendered stereotypes associated with care giving. Principally, Fraser argues, a good interpretation would be one that is reached through processes founded on democratic and equality-based principles.

In summary, this thesis asks how visible unpaid care is in EU law and policy. The considerations outlined by Fraser's "politics of needs" have informed how this question has been structured. By asking the question about visibility, this thesis is asking about how and whether unpaid care has been politicised in the EU context. It is asking whether the matter of unpaid care work has crossed from the realm of private responsibility into a public, political arena. It is asking whether care has been politicised and openly debated across a range of engaged actors and beneficiaries at EU level. And it is asking whether unpaid care work has become the subject of "official political" consideration whereby EU level measures may be taken to address the needs associated with unpaid care work.

The question of visibility in this thesis also refers to the definition of care that has been adopted by EU law and policy makers, and the "interpretation of needs" associated with unpaid care work. To this extent the question of visibility in this thesis is also asking about the processes involved in generating an understanding of

care and unpaid care work in the EU. This includes asking how democratic and egalitarian the processes of interpretation have been. It also includes asking if, during that process, there has been consideration of how the outcomes of each interpretation might impact or disadvantage different groups, particularly reflecting upon gender equality outcomes.

The transformative potential of EU law, "Gender equity" and the "Ideal Universal Care Giver Society"

Turning thirdly to Nancy Fraser's visions of "gender equity" and of an "ideal universal care giver society". Fraser's article, "After the Family Wage: Gender Equity and the Welfare State" drives the approach taken in this thesis to the question of whether rights in EU law are transformative.[88] In her article, Fraser is concerned with the connection between the allocation of unpaid care work and gender equality. She argues for the transformation of the male bread winner model, a model that has been embedded in most industrial-era welfare states and one that is no longer reflective of peoples' lives, families, and jobs, and which has become "obsolete".[89] In proposing an alternative, Fraser describes three potential models that value and distribute unpaid care and paid work in slightly different ways. These are ideal types. Fraser does not suggest that the social or political context exists to make them possible. Rather, the value of these ideal types, lies in their ability to offer a way of thinking critically about what alternative policy approaches offer. Fraser also develops a "complex" framework of "gender equity" that allows for a robust evaluation of each alternative model, assessing their ability to advance gender equality. The solution that she outlines lies in an ideal universal care giver society.[90] This is a world where men and women would just as equally engage with paid and unpaid work.[91]

The different models that Fraser describes are the male breadwinner model; the "caregiver parity" model; the "universal breadwinner" model and the "universal care giver" model. The male breadwinner model is the outgoing model where

[88] Fraser, op. cit. *supra* note 37.
[89] Fraser, op. cit. *supra* note 37.
[90] Fraser, op. cit. *supra* note 37 at pp. 611-613.
[91] Fraser, op. cit. *supra* note 37 at pp. 611-613.

there is a traditional division of gender roles. Fathers are valued for providing the family with economic security. Women are care givers and depend on their husbands financially. The "caregiver parity" model as a potential alternative, would also adopt traditional gender roles but it values these roles equally. In this case the state recognises and generously rewards unpaid care work through care allowances and benefits. The "universal breadwinner" model as a potential alternative, sometimes referred to in policy discourse as the "adult worker" model, envisages both men and women working in the labour market, where they are freed of care and where care is outsourced to the state and to the market. The "universal care giver" model devises that all workers, men and women, are also care givers. Since men and women engage equally in work and care, care becomes the responsibility of both families and public actors, including the state and employers. This would entail a shorter working week and employment enabling services. However, employees would not be expected to shift all care work elsewhere, some informal care work would be publicly supported, and some would be performed at home. Households would not be assumed to be heterosexual nuclear families and a range of caring relationships are envisaged. The care of very young children would primarily be in the home. In this paradigm, care and work are considered equally valuable activities.

Fraser goes on to set out a framework for "gender equity". This is a framework made up of interconnected normative principles. She uses this framework to evaluate each of the alternative models' capacity to progress gender equality. The framework is comprised of interconnected "principles" of gender equality. She uses the term "gender equity" to distinguish the overarching framework from the internal principles of gender equality, and to propose a concept that does not reduce gender equality to a singular normative standard but treats it as a "complex notion comprising a plurality of distinct normative principles".[92] Fraser explains that considering "gender equity" as a complex idea helps to identify tensions or contradictions between the component principles. This supports "more fine-grained appraisals of alternative political strategies and goals".[93]In other words, a policy may appear to pursue a gender equality objective but when

[92] Fraser, op. cit. *supra* note 37 at p. 595.
[93] Fraser, op. cit. *supra* note 37 at p. 596.

Fraser's "gender equity" framework is referred to it is possible to see that the policy advances only one of her principles of gender equality, whilst simultaneously preventing the realisation of the other principles. Such a policy would therefore end up entrenching obstacles to gender equality overall. The objective should be, Fraser writes, to find proposals "that avoid trade-offs and maximize prospects for satisfying all-or at least most-of the … principles".[94]

The principles of gender equality include reducing the poverty and exploitation of women, promoting income equality (between men and women), promoting leisure-time equality, and promoting the equality of respect. They also include promoting the anti-marginalisation of women where the participation of women in the public sphere is encouraged and reducing androcentrism by resisting the view that "men's current life patterns represent the human norm and that women ought to assimilate to them".[95]

Fraser evaluates each of the alternative models against the "gender equity" framework and this clarifies two things. Firstly, it demonstrates her point that when a policy addresses only one or some of the gender equality principles, rather than addressing them all, the overall outcome is that inequality will persist. [96] Secondly, it reveals that out of the potential models, only the "universal care giver" model is successful at advancing these principles and therefore gender equality overall. The universal care giver model is the only model that is designed to transform the gendered roles attributed to paid work and unpaid care.

Turning first to the "care-giver parity" model. This model aims to promote gender equality largely by supporting informal care work. It supports care work being met in the home by making public funds available for different kinds of care allowances. On this basis this model does well against certain of the principles such as the "anti-poverty principle". It also scores well against the "anti-exploitation principle". If the allowances are paid directly to women, it reduces their economic dependence on husbands and partners. It also offers economic security to single parent mothers, reducing the risk of exploitation by employers.

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[94] Fraser, op. cit. *supra* note 37 at p. 600.
[95] Fraser, op. cit. *supra* note 37 at pp. 594 -601.
[96] Fraser, op. cit. *supra* note 37 at p. 595.

However, the care-giver parity models fares poorly against the "income equality principle", institutionalising the "mommy track" which operates to incentivise a male upper breadwinner and a female flexible worker.[97] It does poorly against the "anti-marginalisation principle" as it reinforces the view of women's work and consolidates the gender division of domestic labour, potentially also marginalising women in the employment sector and hindering women's participation in other spheres of life. It also does poorly on the "anti-androcentrism principle" as, whilst it treats caregiving as intrinsically valuable and not as a mere obstacle to employment, it does not value caregiving enough to demand that men do it too; it does not ask men to change their patterns of work and care.

Turning secondly to the "universal breadwinner" model. This model aims to promote gender equality largely by supporting men and women's paid work through providing informal care work; central to this model is state provision of caregiver allowance. It scores well when it is evaluated against the "anti-poverty principle" by keeping most families out of poverty. It also succeeds on the "anti-exploitation principle" by preventing exploitable dependency for most women. Those with jobs and those who know they can secure them will be less vulnerable to exploitation. However, the universal breadwinner model scores poorly on the "leisure time equality principle". It makes an assumption that all of women's care and domestic work can be reallocated when there are some elements that never can be, such as childbearing, family emergencies, the co-ordinating of outsourced care and much more of the work involved in parenting. This model does not reconsider men's role by providing a means of encouraging men to participate in these remaining elements. This model also does poorly when evaluated against the "equality of respect" principle, as it endorses a single standard of citizen-worker for both men and women. The reality being that it is likely under this model that women will retain a greater connection to reproductive and domestic work than men, appearing as "breadwinners manqué": never fulfilling what one might have been.[98]

[97] Fraser, op. cit. *supra* note 37 at p. 608.
[98] See further, Fraser, op. cit. *supra* note 37 at pp. 601-605.

Looking at the two models in this way shows that neither model fully resolves the challenge of the fair allocation of care work, or of gender equality. The universal breadwinner model aims at making women more like men are now by supporting women into the public sphere of paid work. However, this does not sufficiently engage with the private sphere so as to alleviate those pressures on women. The caregiver parity model maintains the gender roles of work and care and sets up an arrangement that values and supports these different roles. However, the model institutionalises policies that do not equally respect the activities and contribution of women in the private sphere. Neither model is able to progress gender equality across the spectrum of principles that Fraser outlines. And neither model asks men to change.

The third model, the "universal care giver" makes women's current experience, of striving to combine breadwinning and care giving, the norm, for both men and women. The "universal care giver" model envisages that all workers, men and women, are also care givers where employers and the state share the responsibility for meeting caring responsibilities. This would include a shorter, flexible working week and public supported care provision. There would not be a requirement that all care work be transferred out of the home, and household care provision would also be valued and supported. This model urges men to become more like women are now, people who do primary care work. If paid work and care work were shared fairly between men and women, more of the principles of gender equality would be progressed. This includes the principles that were promoted by the "care giver parity" model and the "universal breadwinner model" as well as those that were neglected by them. Equalising leisure time and eliminating androcentrism would be progressed and equalising income and reducing women's marginalisation would be improved. So too would equality of respect. This shift in the allocation of responsibility for care work, stimulates change both in the market-place and in the household. In this way the model achieves overall progress towards gender equality. It transforms the gendered attribution of breadwinning and caregiving. This says Fraser contributes to reducing the significance of gender as a means of "social organisation".[99] It blends

[99] Fraser, op. cit. *supra* note 37 at p. 612.

the roles of work and care that are currently distinct from one another and which are epitomised by the public-private dichotomy, and it contributes to dissolving their gender coding.

In summary, Fraser's focus on the interconnection between gender equality and the allocation of unpaid care, and her development of the universal care giver model. leads to the idea of transformation that is referred to in this thesis. There are a number of aspects to this idea. It involves, firstly, the transformation of the gendered roles associated with care work where both men and women are considered to be care givers, equally. Secondly, it includes the transformation of the responsibility for unpaid care work, from a private matter where responsibility lies with the household to a public matter where employers and the state are implicated and respond. Thirdly, it includes a robust commitment to a complex notion of "gender equity" that contains inter-connected principles. These principles include, reducing the poverty and exploitation of women, promoting income equality, promoting leisure-time equality, promoting equality of respect, promoting the anti-marginalisation of women, and reducing androcentrism. Each principle represents a constituent part of "gender equity", whereby progress towards the meaningful realisation of "gender equity", requires progress on all of these principles.

This thesis asks about the transformative nature of rights in EU Social Policy and EU free movement law. By asking this question, this thesis is invoking the ideas developed here by Fraser's universal care giver model and complex gender equity framework. By asking about transformation, it investigates whether the legal rights in EU law contribute to the transformation of the gendered roles associated with care giving. To do this, it asks to what extent the responsibility for unpaid care is transferred by EU law, from the private sphere to the public sphere. And it also asks about the kind of gender equality objective that EU law pursues and whether it has the potential to progress all or most of Fraser's gender equality principles.

Summary

To sum up, three dimensions of analysis inform this thesis. The overall orientation of the research is influenced by a feminist ethic of care. This means that the outlook that has been adopted throughout this research is based on the idea that care is central to the human experience, that care is relevant throughout the lifecycle and that rather than being independent and autonomous we are, as humans, interdependent, vulnerable, and connected through our relationships to one another. Furthermore, care and caring relationships are necessary to sustaining and reproducing life. As such, the separation of the public and private spheres of life is not supported and care is considered to be of public significance, where the state, the market and the family are all implicated. More specifically the question of the visibility of unpaid care in EU law is informed by Fraser's "politics of needs". Here issues relating to the interpretation of care are raised. These include whether care has become "de-naturalised" and "politicised" in the EU. And further, who in the EU context has interpreted what care needs are? And, how democratic have the processes of interpretation been between different EU actors and stakeholders? Finally, the question of whether EU law is transformative is underpinned by Fraser's "ideal universal care giver society". Here the analysis is framed by several questions. Whether EU law contributes to transforming the gendered roles associated to care giving? Whether EU law contributes to shifting care from a private matter to being a public concern? And whether EU law employs a robust approach to gender equality.

Research methods: the socio-legal approach

The research methods in this thesis are socio-legal, combining doctrinal and empirical data. The doctrinal analysis looks in detail at how the legal fields have developed over time. It investigates whether the matter of unpaid care work has been politicised at EU level and the extent to which the principle of gender equality has been incorporated into the evolution of policy and legal discourse. In this way, the visibility of unpaid care in the legal and policy discourse is explored. The doctrinal analysis then turns to the legal rights. The rights are scrutinised for their impact on women when women's caring responsibilities are taken into account. The rights are also scrutinised for their ability to transform the gendered

roles associated with unpaid care work or whether they further entrench gendered stereotypes.

The doctrinal analysis builds on a large body of scholarly work in the area of EU Social Policy that is concerned with the issues of unpaid care work, gender equality, and law.[100] It builds on and updates these academic discussions by offering new insights into the evolution of this field up to and including the EU Commission's Initiative To Support Work-Life Balance For Working Parents And Carers, and Directive 2019/1158 on work-life balance for parents and carers, that followed in 2019.[101] In the field of EU free movement of persons, by contrast, there has been comparatively limited attention to the gender equality implications of how that legal framework accounts for unpaid care work.[102] The Gender Dimension of Geographic Labour Mobility in the European Union Report states that there is "almost a complete neglect of gender and intra-EU mobility research".[103] The analysis in this thesis further reveals and critiques the lack of centrality of care and gender equality in EU free movement scholarship. Furthermore, it explores a more wide-spread neglect of care and gender equality, one encompassing the EU institutions and the free movement of persons legal framework. It considers this relative neglect in terms of the implications it has for the transformative dimension of the legal rights. Finally, through the innovation of

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[100] An example of substantial works includes, Busby, *A Right to Care? Unpaid Care Work inEuropean Employment Law,* (OUP, 2011); Caracciolo di Torella and Masselot, *Reconciling Work and Family Life in EU Law and Policy*, (Palgrave Macmillan, 2010); Caracciolo di Torella and Masselot, "*Caring Responsibilities in European Law and Policy Who Cares?*", (2020, Routledge); McGlynn, "Reclaiming a Feminist Vision: The Reconciliation of Paid Work and Family Life in European Union Law and Policy", 7(2) (2001), Columbia Journal of European Law, 241–272; James, *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (2009, Routledge-Cavendish); Hervey and Shaw, 'Women, Work and Care: Women's Dual Role and Double Burden in EC Sex Equality Law', 8 (1998), *Journal of European Social Policy*.

[101] COM (2017) 252 final, "An Initiative To Support Work-Life Balance For Working Parents And Carers", 2010, *O.J. C 129;* Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, *O.J. L 188*.

[102] Cf Ackers, "Citizenship, Migration and the Valuation of Care in the European Union", 30 (2), *Journal of Ethnic and Migration Studies* (2004), 373–396; O'Brien, "I Trade, Therefore I Am: Legal Personhood in the European Union", 50 *Common Market Law Review* (2013), 1643–1684; Shutes and Walker, "Gender and free movement: EU migrant women's access to residence and social rights in the U.K.", (2018), 44:1, *Journal of Ethnic and Migration Studies*, 137-153; Shaw, "Importing Gender: The Challenge of Feminism and the Analysis of the EU Legal Order", 7 (3) Journal of European Public Policy (2013), 406–431.

[103] "The Gender Dimension of Geographic Labour Mobility in the European Union" Report cited *supra* note 29.

bringing the two fields, Social Policy and free movement of persons, together, this thesis adds breadth to discussions on gender, care and EU law where the overlapping elements of each field, the contradictions and the tensions can be drawn out, examined and scrutinised for new ways of advancing our understanding.

The empirical research builds upon the body of socio-legal work in the field of EU law,[104] this approach reflects the essential insight of such work, that "the experience of law in action always differs from how it appears 'in the books'".[105] The empirical element of this thesis, explores the experience of individuals to test the findings of how the legal rules operate in practice and how they impact women on the ground. The empirical work also aims to draw out insights into how the law evolves. It explores the drivers and obstacles that exist which influence how the institutional actors and stakeholders engage with unpaid care work and gender. This approach attempts to get behind the behaviours of the institutions and actors to better understand the law, its development and operation, and to begin to build a picture for how law and policy could proceed on these issues. This approach is informed by the methodology of Shaw *et al* which rather than solely addressing the experiences of individuals using the law, it looks to the role of law, the legal institutions and those who work with and within them.[106]

The interviews comprise seven semi-structured interviews with civil society organisations active in EU Social Policy matters or EU free movement of persons' law. The interviews were conducted with seven lobby and advice groups based in Brussels, in Belgium, and London and Glasgow, in the UK. The interviewees were selected from within these civil society organisations on the basis of their specialist experience. Each had experience and expertise in either EU Social Policy

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[104] For example, Hunter, "Diversity in the Labour Market: The Legal Framework and Support Services for Migrants entitled to work in the United Kingdom", Hamburg Institute of International Economics (2007); Shaw and Miller, "When legal worlds collide: an exploration of what happens when EU free movement law meets UK immigration law", 38(2), *European Law Review* (2013), 137-166; Ackers and Stalford, *A Community for Children?: Children, Citizenship and Migration in the European Union,* (Aldershot, 2004); Ackers and Dwyer, *Senior Citizenship? Retirement, Migration and Welfare in the European Union*, (Policy Press, 2002); Shutes and Walker, op. cit. *supra* note 102.

[105] Shaw, Miller and Fletcher, "'Getting to grips with EU citizenship' Understanding the friction between UK immigration law and EU free movement law", (Edinburgh Law School Citizenship Studies 2013) p.18, available at < http://www.frictionandoverlap.ed.ac.uk/files/1693_fullreportlowres.pdf> (last visited 4 September 2020).

[106] Shaw and Miller, op. cit. *supra* note 104.

matters or EU free movement law. Of the three Brussels based organisations, one focuses on women's rights and two of these organisations focus on family rights, one of which takes a gender equality perspective. These organisations have between them over 150 years of liaising directly with the EU institutions. Of the four organisations from the UK, two are specialists in EU free movement of persons' law; one specifically on migration and residence rights, and the other largely on access to social welfare and the EU residence rights that underpin this. Both have experience of advising EU nationals residing in the UK and have also been involved in the litigation of significant EU law cases which raise issues relevant to this research. These cases were referred by the UK national courts to the ECJ. The third UK based organisation is a national women's rights organisation. The fourth UK based organisation is a family and child's rights organisation. These latter organisations are active in EU civil society.

The functions of each of the interviewee organisations vary slightly. The interviewees whose focus is on EU Social Policy matters have a representative and lobbying function. Their membership includes smaller or domestic Member State organisations and individuals. These interviewees, amongst other things, lobby the EU institutions for policy development and legal reform. Interviewees with specialism in free movement of persons law also lobby for legal and policy reform however additionally they are advice organisations, providing advice and support to EU migrants in their host country, in this case, the UK. These organisations then engage in legal reform by undertaking strategic litigation on prominent issues, which can involve references to the ECJ. Therefore, while the role of each interviewee organisation is slightly different there is convergence in their experience because they are all actors informally contributing to policy formation and legal development by engaging with the EU institutions. They can speak to how care needs are politicised and interpreted. They also, through their membership or client base, have experience of the practical relevance of the rights, how the rights impact women on the ground and whether they contribute to the transformation of gender roles relating to unpaid care or entrench stereotypes and place obstacles to progress on gender equality.

The interviewees were recruited following preliminary research into which organisations were specialists in EU Social Policy matters such as gender equality, women's rights and family rights, or EU free movement of people. Organisations were then chosen based on their active involvement in feeding into the development of EU law and policy in their respective fields. Be this either through lobbying the legislative institutions or through initiating strategic litigation or intervening as an expert third party in cases at the ECJ. Following this, views were elicited from interviewees as to who other relevant participants may be. Furthermore, a balance was sought between Brussels based organisations and domestic organisations. This was in order to give an account of, on the one hand the perspective of those who are interacting with and supporting the individual beneficiaries on the ground in the domestic context (in the UK). And, on the other hand, Brussels based organisations who have an overview of different Member States experiences and who are also dedicated to liaising with the EU institutions in Brussels.

During the interviewee recruitment phase a challenge was encountered when recruiting EU free movement of persons specialists. To begin with, all of the free movement specialists that were approached were reluctant to take part. Upon reflection this was because the interview invitation had framed the central research focus to be the relationship between unpaid care work and EU law. This was a true reflection of the research subject; however, some free movement specialists did not view themselves as experts in how free movement law intersected with unpaid care. One interviewee, an expert in free movement of persons law, described the issue as being "very much in the shadows" and said that they did not feel that they had sufficient experience on the matter and feared that they would not be helpful in an interview. Whereas, in contrast, for example, the feminist or family rights organisations were very comfortable with discussing issues concerning unpaid care work, gender and law. By following up with the free movement of persons specialists and drawing attention to some of the leading EU free movement of persons case law that inadvertently intersects with gender equality and unpaid care work issues, the free movement of persons specialists saw their connection to the research and agreed to participate. This was true for the UK based free movement organisations. However, the Brussels based

organisations did not take up the invitation of a research interview maintaining that they did not have someone in their organisation with expertise on the matter.

The unwillingness of a free movement of persons law specialist from Brussels to take part in an interview for this thesis could have implications for the research. It means that there is participation from Social Policy specialists from both Brussels and the UK and there is participation of free movement law organisations from the UK but there is not participation from free movement organisations from Brussels. This is interesting in the first instance because it relates to an issue that interviewees raised. Interviewees considered EU civil society and to an extent other actor such as the groupings within the EU institutions, for example, the Directorate Generals in the European Commission and the Committees in the European Parliament, to "work in silos". Thereby, tending to remain within the assumed boundaries of their policy field, both intellectually and practically in terms of their strategic work. The absence, therefore, may be an illustration of the tendency to work in "silos" whereby gender equality matters, such as care, do not form part of the agenda for those working in the field of free movement of persons' law. This issue will be discussed further in the following chapters. However, whilst there is a curious parallel between the unwillingness of the Brussels organisations to be interviewed, a neglect of the gender dimension of free movement, and the interviewees description of the tendency in Brussels to work in silos, there is a limit as to what can be assumed about why these organisations did not take part. When the invitation to the research interview was declined, the reason that was given was a lack of expertise in the gender equality aspects of the free movement rules and the connection it has with care, but without further discussion it is impossible to know more. There may have been other work-related pressures or other reasons that also meant that it was not a suitable time for the individuals to take part.

Secondly, the absence of a Brussels based free movement law specialist could affect the balance in the representation of the interview data. This is mitigated to an extent, in two ways. Firstly, in terms of evaluating the impact of the legal rules on women and their ability to transform gender roles, the UK based interviewees will be able to fully discuss from their experience, the impact of the rules. This is

because a large part of their work involves direct contact with EU migrants and engaging with how the legal rules affect them. They also deal with queries from other advice agencies who are looking for specialist advice on EU law matters. Through the archiving and review of the advice requests and queries that they receive they offer a perspective on the patterns and persistent problems that are encountered. Whilst this will be restricted to a UK perspective it will nevertheless be a robust reflection of how the legal rights impact EU migrants, on the ground. Secondly, in terms of engaging with the EU institutions and of exploring the politicisation and interpretation of rights, the absence of a Brussels based organisation is a disappointment because of the insights that they could bring on this. However, currently the key institution involved in the evolution of the free movement rules is the ECJ. The Citizens' Rights Directive 2004/38 was largely a codification of ECJ case law, and it is ECJ jurisprudence, including references from national courts to the ECJ, that continues to drive the development of the field. This contrasts with a more legislative approach that involves a range of interlocutors engaged in lobbying, politicising, and interpreting the issues. The UK based interviewees are specialists in strategic litigation in the field of EU free movement law and both interviewee organisations have litigated and intervened as third parties in cases that have been referred to the ECJ. Therefore, they are key actors in the interpretation and advancement of issues in the free movement context and will be able to speak to this. This means that they can share insights about engaging with law reform from this important perspective. Nevertheless, these considerations should be kept in mind.

The interviews were semi-structured and took place in December 2016 and December 2019. The gap between interviews was on account of the temporary suspension of the research due to maternity leave and matters relating to interviewee recruitment and availability. The interviews lasted approximately one hour. They were conducted either face to face or over Skype. The interviews were recorded, with the consent of the participant. The interviews were then transcribed. Interview transcripts were de-identified and completely anonymised. The identification code was destroyed at the end of the project and so the retained and published data is completely anonymised.

The transcriptions were thematically coded and analysed. Particular attention was paid when an interviewee made points that were echoed or reinforced separately by another interviewee. In this way, where possible, points were corroborated. And whilst the narrative that emerged on Social Policy matters was distinct from the narrative that emerged from free movement of persons law matters, within each field there was a lot of convergence. To a large extent interviewees from within the same field gave a coherent account. For this reason, the quotes that have been selected for the discussion of the empirical research in Chapter 5 are the best articulation of points that were often made multiple times by different interviewees. Where there was divergence in the accounts of interviewees this is made into a separate point.

The interview questions were structured around three broad themes. Firstly, how visible are the issues surrounding the unequal distribution of unpaid care between women and men in EU policy and legal discourse? Secondly, do the legal rights contribute to the transformation of the gendered roles associated with unpaid care work? Thirdly, what scope is there in the future, for progress through EU law, towards the equal sharing of unpaid care work between women and men? As such the interviews contextualise the findings of the doctrinal analysis and seek to draw out how care is politicised and interpreted at EU level, how it is experienced and whether EU law has a transformative affect, and finally, what institutional drivers and obstacles exist in each field that can influence the progress on the equal allocation of care work and gender equality in the future. The interview findings are discussed in Chapter 5.

Conclusion

To sum up, this chapter has located unpaid care work in a theoretical context and set out the research methods used in this thesis. Influencing the overall orientation of this thesis is a feminist ethic of care, where relationships of dependency, human vulnerability, and care are regarded as fundamental elements of life. And where care is regarded as a central feature of analysis. Two areas of scholarship by Nancy Fraser have influenced the development of the two over-arching research questions that structure the analysis in this thesis. The question of the visibility of unpaid care in EU law is informed by Fraser's "politics of needs" and the question

of whether EU law is transformative is underpinned by Fraser's "ideal universal care giver society".

The research methods used to conduct this research are socio-legal, combining doctrinal analysis of the fields of EU Social Policy and EU free movement of persons law with interviews held with civil society organisations who are specialists in these respective fields. This empirical study contextualises and tests the doctrinal findings of how the legal rules operate in practice and how they impact women with caregiving responsibilities. It also provides insights into how the law evolves and what this can tell us about how the law will evolve in the future.

Finally, by designing the research in this way, by bringing these two fields of EU law together, by structuring the research around the two broad questions concerning visibility and transformation and by conducting empirical research, the aim of this thesis is to provide a fine-grained understanding and evaluation of how the EU is responding in law and policy to the gendered impact of the unequal sharing of unpaid care work and what scope there is for future progress.

Chapter 3 EU Social Policy: Reconciliation of professional and caring responsibilities

Introduction

This chapter focuses on EU Social Policy, specifically, the policy agenda concerning the reconciliation of work and family life. Within this field the connections between care, gender and women's relationship with the labour market have been made in the legal and policy discourse. Beginning with the principle of equal pay and gender equality in the Treaty of Rome[107] and early case law of the ECJ, [108] and culminating in the Work Life Balance Directive 2019/1158,[109] issues concerning unpaid care and gender have been circulating at the EU level for decades. This chapter will take a historical view of the field of EU Social Policy. It will explore how approaches to the dynamic between gender, care and the labour market have evolved. To do so it distils the history of EU Social Policy into four phases. Each phase considers the visibility of unpaid care in the policy discourse of that time and evaluates the legal rights in force. In doing so, it aims to uncover what institutional drivers and obstacles exist that influence progress on measures relating to care and gender equality. Before this discussion, the origins of EU Social Policy, important for understanding the evolution of the field, are explained and key concepts, institutions and actors are presented.

EU Social Policy Explained: Origins, Key concepts, Institutions and Actors

Origins of EU Social Policy

Investigating the origins of EU Social Policy begins with the Treaty of Rome in 1957. Its central focus was establishing a common market and progressively approximating the economic policies,[110] however, from the outset, it is possible to detect that social progress was also anticipated. The Treaty began with the

[107] Art. 119 Treaty of Rome (EEC).
[108] Case C-43/75 [1976], *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, ECLI:EU:C:1976:56, para 53 – 5.
[109] Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive, 2010/18/EU, *O.J. L 188, 12.7.2019, p. 79-93.*
[110] See Art. 3 Treaty of Rome (EEC).

Member States' intention "to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe".[111] Article 2 of the Treaty of Rome then set out the aims of the Common Market as, inter alia, to promote, "a harmonious development of economic activities' accompanied by 'an accelerated raising of the standard of living".[112] This was expanded upon by Article 117, which outlined the beginnings of an EU Social Policy, stating that, "Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained".[113] This social element was there; however, it was, admittedly, vague and under-developed in comparison to the range of activities, articulated in detail, that would be undertaken to create and facilitate the common market. Over the decades social policy has been elevated to a significant objective of the EU,[114] and it is now more fully articulated in a dedicated Title in the Lisbon Treaty.[115] However, its development has not been uncontroversial for Member States and it has not always progressed in a linear fashion.[116] To understand the tensions that underly EU Social Policy and that have influenced the legislative output, it is useful to consider, the reason, in part, for its initial underdevelopment. This is the conceptual challenge that exists between a standard approach to social policy and the unique market making endeavour that was being pursued.[117]

Typically, social policy is understood as government measures that seek to protect the welfare of its citizens. This may include the maintaining of a welfare state such as the provision of social security, health care, welfare services, social work, housing, and education.[118] Social policies therefore create structures or target

[111] Treaty of Rome (EEC) p. 2.
[112] Art. 2 Treaty of Rome (EEC).
[113] Art. 117 Treaty of Rome (EEC).
[114] For example, Interinstitutional Proclamation on the European Pillar of Social Rights *OJ C 428, 13.12.2017,* pp. 10–15.
[115] Art.3 of the Treaty on European Union (TEU), and Articles 9, 10, 19, 45-48, 145-150 and 151-161 of the Treaty on the Functioning of the European Union (TFEU).
[116] Barnard describes the evolution of EU social policy to be 'spasmodic'. Barnard, *EU Employment Law,* 4th ed. (OUP, 2012), p.33.
[117] As described Barnard and summarised below op. cit. cited *supra* note 116 pp35-41.
[118] Marshall, *Social Policy*, (Hutchison, 1975), p.7.

funds in such a way as to achieve social justice outcomes. Marshall notes the social justice motivation:

> Social policy uses political power to supersede, supplement or modify operations of the economic system in order to achieve results which the economic system would not achieve on its own … [It is] guided by factors other than those determined by open market forces.[119]

In other words, whilst there will be an impact on the economy it is essentially a political aspiration seeking to rebalance some inequality. This function of social policy is commonly described as "market correcting". However, for EU Social Policy, it is not quite as straight forward. Streeck observes that the structure of the EU does not lend itself to "market correcting". He notes that,

> Economic governance through fragmented sovereignty and international relations is more suited to *market making* by way of negative integration and efficiency enhancing regulation than to institution building and redistributive intervention or market distortion.[120]

Streeck further explains that the underlying force of EU social policy, as it began in the Treaty of Rome, is,

> Developing a new kind of social policy, one concerned with market making rather than market correcting, aimed at creating an integrated European labour market and enabling it to function efficiently, rather than with correcting its outcomes in line with political standards of social justice.[121]

The form that EU Social Policy took initially, therefore, was more in line with "market making" and the measures included removing obstacles to a "Europe-wide single market".[122] This meant facilitating the mobility of workers, introducing the prohibition on discrimination on the basis of nationality and the establishment of a Social Fund to assist states with labour, welfare and training costs. Measures were

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[119] Marshall, op. cit. *supra* note 118 p.15.
[120] Streeck, "From Market Making to State Building? Reflections on the Political Economy of European Social Policy" in Leibfried and Peirson (Eds.), *European Social Policy: Between Fragmentation and Integration* (Brookings Institution, Washington DC, 1995), p. 399.
[121] Streeck, "Neo-voluntarism: A New Social Policy Regime", (1995) 1 ELJ, 31- 59, p.40.
[122] Streek, op. cit. *supra* note 120 p. 397.

also put in place to prevent distortion of competition; these were intended to avoid behaviours such as "social dumping" by businesses and a "race to the bottom" by States.[123] The political aspirations of addressing social inequality were not as prevalent and the political consensus and impetus was not initially in place and has had to be built over time.

Origins of gender equality in EU law and policy

Notwithstanding the "market-making" quality of EU Social Policy, gender equality would become an important element of EU Social Policy and its origins are also in the Treaty of Rome. This is the principle of equal pay for men and women, which was enshrined in Article 119 (now Article 157 TFEU). Article 119 of the Treaty of Rome was originally included to prevent distortion of the single market on account of a diverging approach to equal pay among Member States and it has, over time, established, more broadly, the principle of gender equality and anti-discrimination in EU law. This principle has been significant in the development of EU Social Policy, at times forming the justification for EU activities, including the yet to be conceived, principle of reconciliation of work and family life and, establishing legal rights in areas beyond equal pay and promoting gender equality as an overarching value of the EU.

At the time of its initial inclusion, it was argued that, without this provision for equal pay, the market could be distorted. France had the constitutionally protected right to equal pay enshrined in its constitution and consequently France had the smallest gender pay gap of all of the Member States. Germany, on the other hand, to a large extent, did not pursue state level policy on the workplace arrangement of pay, and Italy, had a provision on gender equality in the constitution but it reflected women's family and household responsibilities rather than issues of the workplace. France was concerned about having a more expensive workforce especially in the female dominated industries such as textiles and electrical production. Thus, France insisted that to avoid losing competitiveness in the single market the obligation of equal pay must apply

[123] See further, COM (93) 551, "European Social Policy – Options for the Union", European Commission Green Paper 1993; COM (93) 551 "European Social Policy - A Way Forward For The Union A White Paper", 1994.

throughout the Member States.[124] The justification was therefore "market-making".[125] It sought to overcome the differences between Member States, including cultural and legal differences to social policy, and obstacles to a highly functioning common market. It was not "market-correcting", nevertheless it enshrined in the Treaty a concern for the dynamic between gender, equality, and the labour market.

The inclusion of Article 119 enabled the Commission and the ECJ to play a role in the development of the principle. The Equal Pay Directive was adopted by the Council in 1975[126] and it built upon Article 119. It established that the principle of equal pay implied the elimination of any discrimination on the grounds of sex with regard to anything related to pay for the same work or work of equal value. The following year, the Council adopted the Equal Treatment Directive;[127] this broadened the principle of equal pay to equal treatment between women and men in the field of access to employment, professional training and promotion, and conditions of employment. The ECJ meanwhile, had begun to receive preliminary references from national courts with questions of EU law. The case of *Defrenne (no.2)* concerned the clarification of Article 119 and in its judgment the ECJ took the opportunity to uphold the social quality of the article and relate it to the social objectives of the Union. The Court established that Article 119 pursues a twin aim,

> First … to avoid a situation in which undertakings established in states which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-[Union] competition as compared with undertakings established in states which have not yet eliminated discrimination against women workers as regards pay.

[124] Caracciolo di Torella and Masselot (2010) op. cit. cited *supra* note 100100 at pp. 33-35 and Barnard op. cit. cited *supra* note 116 at p. 36.
[125] Barnard op. cit. cited *supra* note 116 at p. 36.
[126] Council Directive 75/11/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women O.J. 1975, L 045
[127] Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training, and promotion, and working conditions O.J. 1976, L 039.

> Second, this provision forms part of the social objectives of the [Union], which is not merely an economic union, but is at the same time intended, by common action to ensure social progress and seek constant improvement of living and working conditions of their peoples. This double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the [Union]' [128]

The articulation of this "double aim" suggested that EU Social Policy whilst constructed of economic market-making regulation also contained some market-correcting or social objective.[129] And so, whilst at times giving way to the economic objective,[130] EU Social Policy has continued to grow and evolve, in pursuit of gender equality *inter alia* and on the basis that it is justified in economic policy terms as well as social policy terms. [131] The double aim is now evident in the expression of Article 3(3) of the Treaty on European Union where the social objectives appear to be in addition to the economic objectives of the EU as well as the desired consequence of them,

> The Union shall establish an internal market. It shall work for sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress…
>
> It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child...[132]

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[128] Case C-43/75, Defrenne (no.2), para 53 – 5. This twin aim was recognised again in Case C-382/92, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, ECLI:EU:C:1994:233.
[129] Barnard, op. cit. *supra* note 116, p.37.
[130] Stratigaki, "The Co-option of Gender Concepts in EU Policies: The Case of Reconciliation of Work and Family" 11 (1) *Social Politics* (2004), 30-56
[131] Barnard, op. cit. *supra* note 116, p.37; Freedland "Employment Policy" in P. Davies, A. Lyon-Caen, S. Sciarra, and S. Simitis (Ed.), *European Community Labour Law: Principles and Perspectives. Liber Amicorum Lord Wedderburn of Charlton*, (Clarendon, Oxford, 1996), 287.
[132] Art. 3(3) TEU.

Key Concepts in EU Social Policy: 'Reconciliation and Work Life Balance'

The interconnected objectives established early on, of gender equality and economic growth led to the development of the principle of reconciliation between work and family life. Reconciliation is broadly understood to mean a range of law and policy measures that are intended to facilitate the balancing of work and family life commitments, most prominently child-care responsibilities but increasingly care of other dependants. Reconciliation measures can include different kinds of leave for parents, flexible working arrangements, and the provision of care services.[133] The measures are aimed at both men and women but it is acknowledged that it is women who face the main challenge of reconciling work and unpaid care as it is women who meet the majority of caring responsibilities.[134] Although the emphasis has not always been consistent, a desired outcome of reconciliation measures is often a fairer distribution of paid work and unpaid care between men and women.[135]

The EU does not have the explicit competence for reconciliation activities, and the process has been somewhat "piecemeal" as a consequence,[136] but it is nevertheless now a prominent feature of EU Social Policy. Legislative measures to date include: Directive 2019/1158 on work-life balance for parents and carers which repealed Directive 2010/18/EU on reconciling family and working life[137]; Directive 92/85/EC on improving the health and safety of workers who are pregnant or have recently given birth;[138] Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of

[133] See for example, COM (2006) 92 final, "A Roadmap for equality between men and women 2006 – 2010", at p.14.
[134] COM (2006) 92 final cited *supra* note 133. p.15.
[135] For further discussion of the social, political and legal meaning of the terms "reconciliation" in this context see Caracciolo di Torella and Masselot (2010), op. cit. cited *supra* note 100 at pp2-6.
[136] Busby and James, "Regulating working families in the European Union: a history of disjointed strategies" *Journal of Social Welfare and Family Law* (2015) 295–308 p302.
[137] Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU *O.J. 2019, L 188*.
[138] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Art. 16 (1) of Directive 89/391/EEC) O.J. 1992, L 348.

men and women in matters of employment and occupation and; [139] Directive 2010/41/EU on the application of the principle of equal treatment between men and women who are self-employed.[140] Directives on part time work, Directive 97/81/EU,[141] the Working Time Directive 2003/88/EU[142] and Directive 99/70/EU on fixed term work,[143] are not conventionally regarded as reconciliation measures, nevertheless they contribute to the facilitation of reconciliation.[144] Soft law measures play a significant role in the reconciliation agenda and a prominent example is the Barcelona child care targets for the provision of child care for pre-school children, set by the European Council in 2002.[145]

Institutions and Actors in EU Social Policy

The institutions and actors that have played a part in shaping EU Social Policy and the principle of reconciliation include the EU institutions, most prominently the Commission and the Council, and the EU Social Partners. The involvement of the ECJ and the European Parliament has been marked by a progressive approach to reconciliation. The Member States have played a role, beyond that which they play in the Council, in terms of their own domestic approaches to social policy.

Of the EU political institutions, the Commission has developed a lot of the detail of the EU's approach to reconciliation. The Commission's annual work programme is guided by the strategies set by the Council. Within this frame they are responsible

[139] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) O.J. 2006, L 204.

[140] Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC O.J. 2010, L 180.

[141] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex: Framework agreement on part-time work O.J. 1997, L 14.

[142] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time O.J. 2003, L 299.

[143] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP O.J. 1999, L 175.

[144] Davaki, "Differences in men's and women's work, care and leisure time", pp.15 – 28. Study for the FEMM committee, Directorate-General for Internal Policies of the Union (European Parliament), 2016. This document is available on the internet at: https://op.europa.eu/en/publication-detail/-/publication/97c41fae-9440-11e7-b92d-01aa75ed71a1, (last visited 30 July 2020).

[145] Presidency Conclusions C/02/930, Barcelona European Council, 15-16 March 2002.

for making legislative proposals and where necessary conducting in-depth consultations with the EU Social Partners. Through the various "Roadmaps" on gender equality and on reconciliation the evolution in thinking at EU policy level is visible. Ultimately it is the Council who control which measures, proposed by the Commission, become law. The Council historically has emphasised the importance of reconciliation policies and the fairer distribution of paid and unpaid work, however their overriding target is in achieving economic growth and improving women's labour market participation.[146] The European Parliament has consistently called for improvements in reconciliation legislation and, as they are not bound by the same political constraints as the Council, they are able to explore reconciliation more fully. An illustration of this is the European Parliament resolution for an EU strategy to "end and prevent the gender pension gap"[147] and the adoption of the Report on Creating Labour Market Conditions Favourable to Work-Life Balance.[148] The ECJ has, traditionally, played an important role in developing individual rights in EU law, it has done so in its jurisprudence on sex discrimination law and it has a developing jurisprudence in reconciliation.[149]

The EU Social Partners are representatives of management and labour; broadly speaking they are employers' organisations and trade unions and include cross-industry or sector specific organisations. There are over 80 organisations considered to be EU Social Partners. The organisations are all organised at EU level but must also be recognised as part of Member States' social partner structures and have the capacity to negotiate.[150] They are engaged in the "European social dialogue", as provided for under Articles 154 and 155 of the TFEU, through the

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[146] Caracciolo di Torella and Masselot, op. cit. cited *supra* note 100, p26 and see Conclusion of the Presidency of the Brussels European Council, 2006, para 40. 7775/1/06 REV 1; and Presidency Conclusions C/02/930 cited *supra* note 145 p.16.

[147] European Parliament, "*Resolution on the need for an EU strategy to end and prevent the gender pension gap",* (14 June 2017).

[148] European Parliament, "*Report on Creating Labour Market Conditions Favourable to Work-Life Balance",* (2 August 2016).

[149] See for example, Busby and James, op. cit. cited *supra* note 136.

[150] The Commission have set out criteria that establishes when an organisation is sufficiently representative of management or labour to entitle them to be consulted: COM (98) 322. The Commission annually publishes a list of the organisations consulted as Social Partners, as of January 2019 this list contained 88 organisations. Eurofound has a mandate to conduct representativeness studies of the social partner organisations: https://www.eurofound.europa.eu/observatories/eurwork/representativeness-studies (last visited 5 Oct 2020).

consultation process initiated by the Commission. They have been instrumental in measures such as parental leave and have expressed commitment to reconciliation policies through, for example, the Social Partner Framework Action on Gender Equality 2005 and Joint Letter from the European Social Partners to the Commission on Child Care in 2008.[151] However, they are confronted with the pragmatic concerns of business and the economy, and as such the Social Partners did not reach an agreement in support of work life balance measures suggested by the Commission, at the second stage consultation in 2016.[152]

Member States contribute to EU Social Policy through their membership of the Council, but the different systems and traditions of how social policy is pursued domestically have an impact on the development of EU Social Policy. Different Member State cultures have produced different models of social policy and labour relations and the intention persists that these different models be maintained.[153] Reconciling these differences to achieve a supra-national social policy has been an enduring difficulty for the development of EU social policy.[154] Typical differences can be seen between states; some with a history of state regulation in the field of social policy, such a Germany, which could accommodate EU level measures, can be contrasted with Nordic states, where industrial relations systems are largely based on self-regulation coordinated by collective agreements. A model, which conflicts with a top down style of regulation but on the other hand comfortably adopts broad concepts of "working environment" and "workers' well-being" and therefore facilitates certain EU initiatives.[155] Whilst harmonisation of social policy is not necessarily advantageous, because difference in this field allows for exploration and experimentation, it has been a challenging context for the

[151] Caracciolo di Torella and Masselot (2010), op. cit. cited *supra* note 100 p 27, UNICE/UEAPME, CEEP and ETUC, "Framework of Actions on Gender Equality", 22 March 2005 and UNICE/UEAPME, CEEP and ETUC, "Joint Letter from the European Social Partners to the Commission on Child Care", 7 July 2008.
[152] C(2016) 2472 final, "Second-stage consultation of the social partners at European level under Art. 154 TFEU on possible action addressing the challenges of work-life balance faced by working parents and caregivers" and COM (2017) 252 final, "An initiative to support work-life balance for working parents and carers", 2017, p.7.
[153] Barnard, op. cit. cited supra note 116 p.43.
[154] Hervey, op. cit. *European Social Law and Policy,* (Longman, 1998) p.24.
[155] Busby, "Access to employment and career progression for women in the European labour market" (PhD Thesis, University of Glasgow 2006) pp.111-112.

Commission to operate within.[156] Currently, further strain is placed by the austerity measures implemented by some Member States, leading to "cut backs" for social policy or reconciliation measures domestically and thereby creating a difficult environment for the pursuit of EU Social Policy.[157]

The evolution of EU social policy, the principle of reconciliation and the visibility of care

The evolution of EU social policy has taken place in the context of underlying conceptual, legal, and political tensions and this has impacted on the realisation of reconciliation and measures relating to gender and care. There are frequently periods of stagnation where legislation stalls or where policy priorities are focused elsewhere. But there are also periods of innovation which have led to new institutional frameworks facilitating engagement from institutions and stakeholders and ultimately, legislative activity. It is possible to chart the evolution of ideas which lead to care becoming visible in EU policy discourse and to analyse the range of measures and increasingly strategic responses to the matter of reconciliation of work and family life, where now, the issue of unpaid care is central. As such the history of EU Social Policy in this chapter focuses on these policy and legislative developments (rather than tracing the ECJ jurisprudence) and is classified into "phases" to highlight the significant shifts in approach. These phases draw from, and build on, those that have been distinguished by Hervey, in the field of EU social policy overall,[158] and by Caracciolo di Torella and Masselot, on the matter of reconciliation specifically.[159] The last phase brings developments in the field up to date and includes analysis of the most recent developments.

[156] Barnard, op. cit. *supra* note 116 at p. 43.
[157] Busby and James, "Regulating Work and Care Relationships in a Time of Austerity: A Legal Perspective", in Lewis, Anderson, Lyonette, Payne, and Wood (Eds.), *Work-Life Balance in Times of Recession, Austerity and Beyond* (Routledge, 2016), pp.78-92.
[158] Hervey, op. cit. cited *supra* note 154.
[159] Caracciolo di Torella and Masselot (2010), op. cit. cited *supra* note 100.

Phase 1 'The European workforce; the visibility of women and families' 1970s – 1990s?

Introduction

This first phase, beginning in the 1970s was a pivotal period for EU Social Policy. Whilst it is possible to detect in the Treaty of Rome, the foundations of EU Social Policy, during this period there was a marked transformation in approach. The Council committed to the development of social harmonisation as well as economic integration and the Community's first Social Action Plan was produced. The obstacles and challenges faced by women were expressed as a specific objective and the concept of "reconciliation between work and family life" was used in Community policy discourse for the first time.

Context

The explanation for the increased activity in a social agenda was the changing socio-political environment in Europe.[160] In Member States, elections produced social democrat governments who began to question the neo-liberal, business focused tendency of the European model to date and there began to be an appetite for a social side to Europe that could appeal to citizens.[161] As such, and perhaps also to further their own domestic social agendas, these governments brought political will to the Council of Ministers and the European Council.[162] Parallel to this, the ECJ judgment in *Defrenne (No.2)* declared the direct effect of Article 119 and demonstrated, to practitioners and decision makers in Member States, the scope for individual social rights in EU law.[163]

Policy goals

The European Council Paris Summit in 1972 sought to bring a "new dimension" to the European project. Following the Summit, the Heads of State released a Joint Declaration outlining the objectives to be pursued and confirmed their

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[160] Hervey, op. cit. *supra* note 158 at pp.16-17.
[161] Hervey, op. cit. *supra* note 158 at p.17 and Barnard, op. cit. cited *supra* note 116 p.8-9
[162] Streek, op. cit. *supra* note 120 at pp. 42 -43.
[163] Busby, op. cit. cited *supra* note 155 p106 citing A. Lester, 'The Uncertain Trumpet. References to the European Court of Justice from the United Kingdom: Equal Pay and Equal Treatment without Sex Discrimination' in HG. Schermers et al (eds) *Article* 177 *EEC: Experiences and Problems* (TMV Asset· Instituut, 1987), at p. 164,

commitment to the development of social harmonisation as well as economic integration.[164] The historic Social Action Plan which followed, produced by the Commission and passed by the Council in 1974, was the Community's first Social Action Plan.[165] It laid the foundations for legislative activity in this area. It contained four broad themes within the labour law field. These were: equal treatment between men and women at work; harmonisation of labour law; the development of common standards for working conditions; and supranational employment and regional policy. In pursuit of equality, the obstacles and challenges faced by women were expressed as a specific objective and the concept of "reconciliation between work and family life" was introduced into Community policy. The measures pursued were soft law measures, many of which were geared around setting up an infrastructure at EU level for research and development of the issues, of raising the profile of gender and the importance of reconciliation.[166]

Analysis

The reconciliation of work and family life was of interest to the Commission for several reasons. [167] On the one hand, the Commission was interested in family policy and how EU law affected families as a way of assessing how to facilitate the free movement of people.[168] On the other hand, high unemployment throughout the Member States led policy makers to the belief that, for the success of the internal market, there was a need for as many workers as possible. Encouraging women into the labour force, therefore, became a key objective. In this way, there was an acknowledgment of the importance of gender policies and reconciliation strategies for the overall economic success of the internal market.[169]

The approach to reconciliation, during this phase, was grounded in gender equality and was expressed as an objective being sought for "all": both mothers and

[164] Bulletin of the European Communities, "Statement from the Paris Summit", at p.16. October 1972, No 10. p. 14-26. Luxembourg: Office for official publications of the European Communities.
[165] COM (73) 1600 "Social Action Programme", 1974, EC Bull Supp 2/74.
[166] COM (73) 1600 cited *supra* note 165 at p.23.
[167] Caracciolo di Torella and Masselot (2010), op. cit. cited *supra* 100 pp 36-37.
[168] Parliament Resolution "Family Policy in the EC", O.J. 1983, C184/116; COM (89) 363 final 'Family Policies', 1989; Conclusions of the Council and of the Ministers Responsible for Family Affairs, O.J. 1989, C277/2.
[169] Stratigaki, op. cit. *supra* note 130.

fathers.[170] It sought to "bring about a situation in which equality between men and women obtains in the labour market throughout the Community".[171]

However, the means to do this was identified as the provision of "facilities to enable women to reconcile family responsibilities with job aspirations".[172] This was developed further in two subsequent Equal Opportunities Action Programmes and then in the Community Charter of the Fundamental Social Rights of Workers on Equal Treatment for Men and Women.[173] Taking this approach limits the type of gender equality pursued, it is a "formal" type of equality: "treating like things for like", there is a language of neutrality but the practicalities are all focused on women, which, Fredman argues, fails to penetrate the existence of structural inequality.[174] The objective was the increase of women in the labour force and this meant introducing measures so that women could be the same as men: as equal participants in the labour market. The objective, therefore, was enabling women to work whilst meeting their caring responsibilities rather than to seek substantive equality through the deeper distribution of caring responsibilities.

The connection between the private sphere, of domestic unpaid care, gender equality and a well-functioning labour market was made during this period. Reconciliation between work and family life became an EU concern and visibility of women's experience was enhanced. However, the agenda was driven by an economic rational and reconciliation was expressed through a formal equality approach, which did not provide transformative approaches to gender roles. There were no legislative measures during this stage and by the end of this phase things began to stall. Member States were facing a recession, rising unemployment and inflation, and the EU was facing competition from the unregulated markets of the USA and China. Enthusiasm for social policy activities waned, Member States retreated to reflect on current approaches to industrial relations and so the

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[170] COM (73) 1600 cited *supra* note 165 p. 8.
[171] COM (73) 1600 cited *supra* note 165 p. 23.
[172] COM (73) 1600 cited *supra* note 165 p.23.
[173] COM (81) 758 final "A New Community Action Program on the Promotion of Equal Opportunities for Women 1982–1985"; COM (85) 801 final, "Equal Opportunities for Women: Medium Term Action Program", and Declaration by President Delors at the European Council of Strasbourg "Community Charter of the Fundamental Social Rights of Workers on Equal Treatment for Men and Women" 8 Dec 1989.
[174] Fredman, "European Discrimination Law: A Critique", 21 *Industrial Law Journal* (1992), 119–134.

political will in the Council withered. For the next decade, there was little commitment to EU Social Policy initiatives.

Phase 2 Innovation and legislative activity 1986 – 1993

Introduction

This phase was characterised by innovation, new actors and ultimately by legislative activity. Institutional changes to procedures and powers were made by two Treaty revisions, the prominence of gender equality within the EU was elevated and the role of the EU Social Partners was formalised. These developments meant it was possible to proceed with EU measures, and legislation on reconciliation began to complement soft law policies. Differences remained among Member States, but nevertheless the EU grew in confidence in its approach to Social Policy.

Context

The new sense of clarity on the EU's approach to social policy can partly be explained by the new president of the Commission, Jacques Delors who was able to articulate the interconnection between social and economic objectives of the EU. In his "Espace Sociale Europeene" (European Social Area) speech President Delors stated:

> The creation of a vast economic area, based on the market and business cooperation, is inconceivable – I would say unattainable – without some harmonisation of social legislation. Our ultimate aim must be the creation of a European social area.[175]

The 1986 Single European Act amended the rules governing the operation of the institutions and expanded Community powers. Critical to the field of reconciliation a new competence of "encouraging improvements, especially in the working environment, as regards the health and safety of workers" was added. This competence was subject to the new method of Qualified Majority Voting (QMV) and co-operation procedure with the Parliament. This method would bring a

[175] Delors, "Espace Sociale Europeenne" speech, 1986, cited in Hervey, op. cit. *supra* note 158 at p. 21.

change to the deadlock that had been occurring because of unanimity voting. Szyszczak credits QMV as an "ingenious device" as it could be used for non-contentious health and safety matters but could also be broadened to include different aspects and overall, would facilitate legislative activity.[176] Another institutional development was the new responsibility given to the Commission, to develop dialogue between management and labour at European level; what was to become the EU Social Partners. The approach of social dialogue over the style of top-down initiatives on social policy was welcomed by Member States.

Policy goals

With a new institutional context in place, impetus for legislation soon followed. Following adoption of the Community Charter of the Fundamental Social Rights of Workers,[177] the Commission drew up the 1989 Social Action Programme[178] aimed at implementing the Charter. The Action plan contained 47 proposals for initiatives of various kinds, both soft law measures and legislative proposals, including *inter alia* an initiative for a Directive on the protection of pregnant women at work.

Legislative reality

The main success of the 1989 Social Action Plan was the adoption of legislative measures concerning the health and safety of employees at work, an area where the Single European Act had established EC competence. On this basis the first binding reconciliation measure was passed (although there had already been a number of equal treatment Directives[179]) Directive 92/85/EC on improving the health and safety of workers who are pregnant or have recently given birth, the "Pregnant Workers Directive".[180] The Directive offered three forms of employment protection to pregnant workers and workers on maternity leave. All but one of

[176] Szyszczak, *EC Labour Law,* (Longman, 2000), at p. 10.
[177] "Community Charter of the Fundamental Social Rights of Workers on Equal Treatment for Men and Women" cited *supra* note 173.
[178] COM (89) 568 "Social Action Programme", 1989.
[179] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, O.J. L 39 and Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, O.J. L 359.
[180] Directive 92/85/EEC cited *supra* note 138.

these protections, the right to pay during maternity leave, was available from the first day of employment. The Directive entitled women to time off for ante-natal appointments, without a reduction in pay, where the appointment needed to take place within working hours.[181] Secondly, women were entitled to a period of at least 14 weeks maternity leave, at least two weeks of which must be before and/or after confinement.[182] During this leave, payment, whether in the form of a salary or an adequate allowance must be maintained, in accordance with national legislation or practice. Member States retained the right to prescribe eligibility for maternity pay through national legislation.[183] Thirdly, pregnant workers could not be dismissed during the period from the beginning of their pregnancy to the end of their maternity leave save in exceptional circumstances.[184] Finally, the Directive provided for the procedural right of a remedy. Member States must provide the ability for women to bring a claim either judicially or by other means to protect the rights granted under the Directive.[185]

Presently, the Treaty of Maastricht was signed. New competences in the field of employment and industrial relations were included and were subject to QMV and the role of the EU Social Partners was formalised and put on a constitutional footing by the Treaty.[186] This saw reconciliation gradually moved from the Community agenda to the EU Social Partners, and their contribution to the legislation in this field was considerable. The first Directive adopted as a result of an agreement concluded by the Social Partners was the Parental Leave Directive 96/34/EC on reconciling family and working life.[187] This Directive, addressed the question of taking time off to care for young children and it set minimum requirements intended to facilitate the reconciliation of parental and professional responsibilities for working parents. It applied to all workers, men and women,

[181] Directive 92/85/EEC cited *supra* note 138 Art. 9.
[182] Directive 92/85/EEC cited *supra* note 138 Art. 8(1) and (2).
[183] Directive 92/85/EEC cited *supra* note 138 Art. 11 (2) (a), (b).
[184] Directive 92/85/EEC cited *supra* note 138 Art. 10.
[185] Directive 92/85/EEC cited *supra* note 138 Art. 12.
[186] Art. 152 and 154 TFEU (ex Article 138 EC).
[187] Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC O.J. 1996, L 145. This was amended by Council Directive 97/75/EC of 15 December 1997 and then replaced by Council Directive 2010/18/EU *O.J. 2019, L 188. It is* now repealed by Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers.

who have an employment contract or employment relationship. It granted men and women workers an individual right to parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child, for at least three months, until a given age up to 8 years to be defined by Member States and/or the social partners. To promote equal opportunities and equal treatment between men and women the right to parental leave, the Directive stated, should, be granted on a non-transferable basis. The conditions of access and detailed rules for applying parental leave were to be defined by law and/or collective agreement in the Member States. In order to ensure that workers exercised their right to parental leave, Member States and/or management and labour were to take the necessary measures to protect workers against dismissal on the grounds of an application for, or the taking of, parental leave. At the end of parental leave, workers were to have the right to return to the same job or, if that was not possible, to an equivalent or similar job.

Also, during this phase, Directive 97/81 on Part time workers[188] and Directive 99/70 on Fixed Term Work[189] were passed. These Directives were not specifically part of the equality, or reconciliation, agenda however they were modelled on the earlier equality directives and ultimately supported women with caring responsibilities, who make up the majority of part-time workers and a significant proportion of fixed term workers. The Part time Workers Directive had two objectives: the removal of discrimination against part-time workers; and the removal of obstacles which may limit the opportunities for part-time work. The purpose of the Fixed Term Workers Directive was to, improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination and, establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships. Finally, and important for the reconciliation agenda, a soft law measure on child care was passed: Council Recommendation on "Child Care".[190] The recommendation encouraged Member States to take and/or progressively encourage initiatives to enable women and

[188] Council Directive 97/81/EC cited *supra* note 141.
[189] Council Directive 96/34/EC cited *supra* note 143.
[190] Council Recommendation of 31 March 1992 on child care O.J. 1992, L123/16.

men to reconcile their occupational, family and upbringing responsibilities arising from the care of children.

Analysis

The legislative activity during this phase, was unprecedented in the history of the reconciliation principle however analysis of the substance of each measure belies a limited impact. The Pregnant Workers Directive was *prima facie* a significant success. Prior to this Directive, pregnant women or women on maternity leave were treated under the Equal Treatment Directive (ETD). Whilst the Pregnant Workers Directive is not exhaustive, it was the first time that pregnant women and women on maternity leave, were treated outside of the anti-discrimination model of the ETD and in a way that acknowledged the particular circumstances. However, in real terms it did not improve upon the standards already available in most Member States, for example it left matters of pay during maternity leave to Member States. In considering the approach taken to reconciliation, it is important to note that the legal base for the Directive was the new health and safety competence.[191] This was expedient in terms of the use of QMV but, Caracciolo di Torella and Masselot argue that it suppresses the social quality of pregnancy and maternity by presenting the situations "almost as medical conditions".[192] This approach leads the Directive to focus solely on women and does not mention fathers. This omission reinforces the assumptions that childbirth and child rearing are women's issues, in doing so it preserves the idea of mothers as care givers and entrenches gender roles.[193]

The Parental Leave Directive's main purpose was stated as the reconciliation of parental and professional responsibilities for working parents, a significant high point in the evolution of the reconciliation principle. However, its impact was limited, in part, because, many Member States already had similar systems in place by this time. The Directive included a clause that prevented the transfer of leave between mothers and fathers, adopted from the Scandinavian model, as a means of encouraging fathers to use the leave on offer, an important inclusion for

[191] Art. 118a EC (now Art. 153(1)(a) TFEU).
[192] Caracciolo di Torella and Masselot (2010) op. cit. *supra* note 100159 at p.58.
[193] Caracciolo di Torella and Masselot (2010) op. cit. *supra* note 100 Ch 2 'The Leave Provisions'.

promoting the fairer distribution of caring responsibilities between men and women. However, the Directive does not address matters concerning pay and social security leaving it to Member States' legislation, and this severely limited the Directive's impact because without sufficient financial provision fathers take up rates are poor. [194] Furthermore, Stratigaki observes that the Directive had lost "equal treatment between men and women" as a main objective, one which had been present in a proposal made by the Commission a number of years earlier and before the Social Partners framework agreement.[195] This, she says, can be seen in the focus that is placed on "the need for flexibility in the labor market rather than a need to reinforce gender equality in the labor market".[196]

The Part Time Workers Directive and the Fixed Term Workers Directive, whilst contributing to the recognition of the obstacles women faced in the labour market, were primarily focused on employers' needs for a flexible work-force and lacked a gender equality approach. Caracciolo di Torella and Masselot note that for the Social Partners the priority was facing the challenge of rising unemployment and the need to restructure the labour market rather than the realities and needs of those combining work with unpaid caring responsibilities.[197] Finally, the Child Care Recommendation was welcomed as the first equality measure to emphasise the importance of men's role in child care but the Recommendation was not binding and it had little effect. [198]

So, whilst the legislative activity appeared to be a boon for the reconciliation principle, it was in fact superficial in terms of pursuing an approach that sought gender equality and a form of reconciliation that would challenge gender assumptions and promote change in caring and workplace practice. This is reflected by the Commission's explanation of "reconciliation" as the need to "harness the economic potential of women" in the workforce.[199] EU Social Policy

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[194] Eurofound (2019), "Parental and paternity leave – Uptake by fathers", Publications Office of the European Union, Luxembourg.
[195] Stratigaki, op. cit. *supra* note 130 at p. 47.
[196] Stratigaki op. cit. *supra* note 130 at p. 48.
[197] Caracciolo di Torella and Masselot (2010) op. cit. *supra* note 100 p. 39.
[198] Hokyns, *Integrating Gender: Women, Law and Politics in the European Union* (London: Verso, 1996), p. 52.
[199] COM (98) 770 final "Interim Report of the Commission on 'The implementation of the Community Action Program on Equal Opportunities for Men and Women (1996–2000)", 1998, at p.13.

more broadly, experienced an increase in momentum and new competences were gained. However, the measures adopted were not necessarily going beyond what already existed in Member States and despite the increased profile of equality in the Social Policy Agreement, the economic rationale remained prevalent. Furthermore, the legislative activity should not mask the continuing tensions surrounding EU Social Policy for Member States. During the drafting of the Maastricht Treaty, the EU competences for Social Policy were contained in the EU Social Policy Agreement, annexed to the Treaty by the Social Policy Protocol. This was to allow the UK, who had resisted the new competences, to "opt-out" of the Social Policy Agreement. For the first time the underlying differences between Member States, present in the EU Social Policy field, became "institutionalised".[200]

Phase 3 Dynamism. Amsterdam to Work-Life Balance Package 2008 *1993 - 2008*

Introduction

This was a dynamic phase for EU Social Policy and for the evolving concept of reconciliation. The EU, in the face of globalisation and competition from the de-regulated markets of America, China and the far-East, responded with a compelling model for the single market; opting for high wages and high quality with market flexibility and employee security.[201] However despite bold and innovative policy objectives, the anticipated legislative achievements for this phase were curtailed on account of the enduring complexities of Member States differences and the increasing use of the Open Method of Coordination.

Context

The Treaty of Amsterdam was signed in 1997. The changes introduced by the Treaty bolstered the Social Policy field and were transformative for the principle of gender equality. Two major changes were in the opening Articles: Article 2 EC (now Art. 3(3) TEU) transformed equality policy into a proactive obligation and the promotion of equality between women and men was listed among the tasks of the Union. Article 3 (now Art. 8 TFEU) introduced gender mainstreaming; this innovation required gender implications to be considered routinely as part of

[200] Hervey, op. cit. *supra* note 158 at p. 25.
[201] Barnard op. cit. *supra* note 116 pp. 106 – 111.

policy preparation in all areas. A third significant change which had indirect significance for equality and reconciliation was the inclusion of the Employment Title granting the EU new legal bases in the employment field and more powers to monitor national employment strategies. The reconciliation concept did not receive express change but these related changes, have been crucial to its subsequent development.

Of political importance during this time was the election of a pro-European Labour government in the UK, in 1997 which immediately opted to participate in the EU Social Policy Agreement and contributed to a political appetite for progressing social policy at EU level.[202] The political vision for the EU was expressed by the Lisbon Strategy in 2000 and reaffirmed in 2005. During this time the EU was also influenced by the increasingly globalised marketplace and ageing population. To remain globally competitive in the face of the less regulated markets of America, South East Asia and China, the EU opted for a social model defined by high-skills and high quality rather than low wages and low-quality. So, from around the time of the Amsterdam Treaty, the EU focused on "flexibility for firms combined with security for workers".[203] In terms of earlier definitions used to describe the single market, this model departs from the distinct approaches of "market making" or "market correcting" and instead views EU Social Policy "as an input into the productive process and not a burden on it".[204]

Policy goals

The policy objectives for reconciliation during this phase were bold. The reconciliation field was lifted out of a formal equality approach and became a more "dynamic" concept.[205] Rather than focusing on women and the traditional role of mothers, a "shared roles model" was adopted which assumed both parents have the same capacity for work and care. The 2000 Council Resolution on "The

[202] Barnard op. cit. *supra* note 116 pp. 19-22.
[203] Barnard op. cit. *supra* note 116 pp. 106 – 111.
[204] Barnard op. cit. *supra* note 116 p.110.
[205] A term used by Caracciolo di Torella and Masselot (2010) op. cit. *supra* note 100 at pp 32 - 33. They refer to a "dynamic" approach to reconciliation as an approach that promotes a "shared roles model" between parents. It is an approach that is also not limited to nuclear families but is expanded to all caring responsibilities. It is an approach that challenges the existing stereotypes that uphold current conceptions of employment, the market and society in general.

Balanced Participation of Women and Men in Family and Working Life" expressed these ideas, it aspired to equality for men and women in a,

> New social contract on gender, in which the de facto equality of men and women in the public and private domains will be socially accepted as a condition for democracy, a prerequisite for citizenship and a guarantee of individual autonomy and freedom.[206]

Furthermore, the 2000 Council Resolution referred to the "right" to reconcile family and working life for men and women and it was explicit about care of the elderly, disabled and other dependent persons. The mention of these groups was an important departure from the tendency to focus on childcare, especially babies and pre-school children and, expressed an appreciation for care needs to be understood as existing at various times throughout the life cycle. At this point it appeared that the private sphere of unpaid caring responsibilities was becoming more visible than ever in EU policy.

In 2002, the Barcelona childcare targets for childcare service provision were set at the Barcelona Council. In light of the commitment to achieving full employment as expressed in the Amsterdam Treaty and reconfirmed in the Lisbon Strategy, the Barcelona Council concluded that,

> Member States should remove disincentives to women's employment and strive to provide childcare facilities by 2010 to at least 90 per cent of children between 3 years old and mandatory school age and at least 33 per cent of children under 3 years of age.[207]

These targets became a central feature of the Lisbon Strategy. The creation of the Targets was recognised to be an important strategy, necessary to support new parents, especially women, into work and they are an important element of the reconciliation agenda.

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[206] Resolution of the Council and the Ministers for Employment and Social Policy, meeting within the Council of 29 June 2000 on "The Balanced Participation of Women and Men in Family and Working Life", O.J. 2000, C218/5.

[207] Barcelona European Council 15-16 March 2002, Presidency Conclusions, [EU European Council], 2002, S.N. 100/1/02 REV 1.

Legislative reality

The legislative activity that might have been anticipated given the rhetoric on reconciliation and the Treaty changes in the previous period did not materialise. The legislative proposals that were made suffered from the same challenges and tensions between Member States that persist more broadly, in the field of EU Social Policy. Compounding these persistent challenges was the growing unemployment crisis that Member States were facing. Such a tough economic climate created an environment amongst Member States that was not receptive to EU intervention in social policy. Their focus was on job creation, an agenda that Member States considered to be "at the heart of national sovereignty".[208]The Commission found these challenges difficult to overcome. A new approach to the policy process was needed that could navigate the diversity among Member States and manage the political sensitivities. The result was the Open Method of Co-ordination (OMC). The Amsterdam Treaty had introduced the Employment Title which had led to the European Employment Strategy, and the creation of the OMC. The OMC was a means of coordinating national policy through voluntary, intergovernmental co-ordination, using non-binding, flexible instruments, and new techniques such as bench marking. The OMC was officially named by the Lisbon Council in 2000 and extended to the social policy field. The Commission, in the European Governance White Paper, explained that the OMC is "a way of encouraging cooperation, the exchange of best practice, and adding value at a European level where there is little scope for legislative solutions".[209] This is done through a combination of setting common targets, guidelines for Member States and, often, national action plans. Regular monitoring of these measures enables Member States to compare efforts and learn from the experience of others. Ultimately, the Council stated, it is a "means of spreading best practice and achieving greater convergence towards the main EU goals".[210]

Barnard notes that proponents of the OMC argue that it offers a "third way" for EU Social Policy between "regulatory competition (with a risk of a race to the bottom)

[208] Barnard op. cit. *supra* note 116 p.23.
[209] COM (2001) 428 'European Governance. A White Paper', 2001, O.J. 287.
[210] Lisbon European Council, Presidency Conclusions 23 – 24 March 2000, 2000, para 37.

and harmonisation (with the risk of ill-suited uniformity)".[211] The Commission also state that, "it can sit alongside a legislative approach, in areas such as … social policy, or it can stand alone, adding 'value' at a European level where there is little scope for legislative solutions".[212] This feature prompts Hervey to argue that, "where we seek to resolve complex social problems, such as inequality of women and men, a notion of 'mixity' or 'hybridity' of old governance (hard law equality Directives) and new governance (soft law resolutions and OMC techniques such as indicators and benchmarking) probably holds the key to the realisation of our goals".[213]

In the area of care the OMC has been essential,[214] it has contributed for example, to the development of reconciliation, illustrated by the development of the Barcelona childcare targets,[215] where there is otherwise no institutional framework.[216] However, it should be remembered that whilst the OMC is felt to have been a success at overcoming some of the challenges that EU Social Policy has faced, it remains a soft law measure that is dependent upon Member State action and is undermined without it.[217] In the experience of the Barcelona childcare targets, the targets have not been fulfilled. The Draft Joint Employment Report 2015 found that "while progress has been made, wide gender gaps are still prevailing" and "while a majority of Member States made progress towards the Barcelona targets on childcare provision since 2005, only nine Member States met the objective of 33% coverage rate for children under three years of age in 2012"[218] and Caracciolo di Torella and Masselot question the reliance on the OMC

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[211] Barnard, op. cit. *supra* note 116 at p. 119.
[212] COM (2001) 428 cited *supra* note 209, at p. 22.
[213] Hervey, 'Thirty Years of EU Sex Equality Law: Looking Backwards, Looking Forwards' 12 *Maastricht Journal of European and Comparative Law,* (2005) 307-325, at 322.
[214] Caracciolo di Torella and Masselot (2010) op. cit. *supra* note 100 at p. 28.
[215] European Council of Barcelona cited *supra* note 207 p.12.
[216] See further, Caracciolo di Torella and Masselot (2010) op. cit. *supra* note 100 pp. 142 – 146.
[217] Barnard, op. cit. *supra* note 116 at p. 119-120; Caracciolo di Torella and Masselot note that the OMC is not strictly soft law but similar as it is not binding nor is there a mechanism of enforcement. The main difference is that it doesn't set out to achieve a common policy, it doesn't produce shared principles or declarations and is instead an institutionalised process of sharing policy experience and best practice, Caracciolo di Torella and Masselot (2010) op. cit. *supra* note 100 at p.28.
[218] European Commission, 'The Draft Joint Employment Report from the Commission and the Council' accompanying COM (2014) 906 final, The Annual Growth Survey, 2015, p.23.

as an appropriate "way forward".[219] In the area of reconciliation which may challenge traditional structures and assumptions, binding, hard law rights would support OMC methods. Further criticisms see the future of EU Social Policy, with the use of OMC, to be one where the convergence of social policy is promoted at the expense of the harmonisation of binding rights.[220]

Hard law measures on reconciliation did not share the dynamism that the policy field enjoyed during this phase, notwithstanding significant activity from the institutions and EU Social Partners.[221] In 2008 the Commission launched the "Work-Life Balance package", setting out a number of legislative proposals seeking to enable the reconciliation of "professional, private and family life". But this appearance of progress belies substantive shortcomings.

The "Work-Life Balance package" was published following consultation with the EU Social Partners. It included the Commission Communication on "A Better Work-Life Balance"[222] explaining the background, two legislative proposals: a revision of the

Pregnant Workers Directive[223] and a revision of the Self-Employed Directive[224] and, a report on Member State progress towards the Barcelona childcare targets.[225]

The Communication is the "most progressive part of the package",[226] as it describes the importance of interconnected policies in achieving reconciliation. The holistic approach expressed includes a range of leaves: paternity leave, adoption leave and leave to care for other family members, to be supported by arrangements such as flexible working, care facilities for dependants as well as for children. It also emphasises the importance of encouraging men's uptake of

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[219] Caracciolo di Torella and Masselot op. cit. *supra* note 100 at p.145.
[220] Barnard, op. cit. *supra* note 116 at pp.119-120.
[221] For example, Directive 2006/54, the Equality Directive was recast but it was, to the most part the consolidation of the existing acquis with few novelties.
[222] COM (2008) 635 final, 'A Better Work-Life Balance: Stronger Support for Reconciling Professional, Private and Family Life', 2008.
[223] COM (2008) 637 final, 'Proposal for a Directive amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding', 2008, 2008/0193 (COD).
[224] COM (2008) 636 final, 'Proposal for a Directive on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Directive 86/613/EEC', 2008, 2008/0192 (COD).
[225] COM (2008) 638 final, 'Implementation of the Barcelona Objectives Concerning Facilities for Pre-School-Age Children', 2008.
[226] Caracciolo di Torella and Masselot (2010) op. cit. *supra* note 100 at p.47.

reconciliation options. The proposal to amend the Pregnant Workers Directive sought to extend the period of paid maternity leave from 14 to 18 weeks, on the basis of full pay subject to a statutory cap and to extend the period further for women with premature babies, babies sick at birth and multiple births. It included the right for women returning from maternity leave to request flexible working arrangements and it increased the protection against dismissal. The proposal to amend the Self-Employed Directive included giving the option to self-employed women to be covered by a social security scheme.[227] Finally, a report on the progress of the Barcelona child-care targets was produced.

Analysis

On the face of it the "Work-Life Balance package" is an important development in the field of reconciliation, offering the promise of hard law rights. Preceding the 2008 "Work-Life Balance package", the Commission, in 2006, published the "Roadmap for Equality"[228] where achieving reconciliation was one of the priority objectives and it appeared that the "Work-Life Balance package" would have a gender equality agenda. However, it is largely driven by the economic objectives of the Lisbon Strategy, of growth and competitiveness, over advancing equality. The Commission justification in the Proposal to amend the Pregnant Workers Directive is suggestive of the weight placed on the economic justification over equality:

> Gender equality lies at the heart of the Lisbon Strategy: since the gender gap in employment rates of women with children and men with children is wide, bridging that gap is vital if the EU target for female employment rates is to

[227] This proposal was successful and the new directive, Directive 2010/41/EU on the application of the principle of equal treatment between men and women who are self-employed, came into force in 2012.

[228] COM (2006) 92 final, 'A Roadmap for Equality between Women and Men 2006 – 2010', 2006. The Commission saw three priorities in this area namely, the availability of flexible working arrangements for men and women, increasingly care services for elderly and disabled people, and ensuring that the services and structures are suitable for both men and women. The Commission conducted a formal consultation with the EU Social Partners scoping for input on the need for paternity leave, adoption leave and leave to care for dependent family member as well as young children and equal pay.

> be met. Reducing the gap is also crucial to achieving greater gender equality. [229]

The Commission Communication presented an integrated approach to reconciliation, with a range of ideas addressing the need for care for older children, the elderly and other dependants; a move that supports the idea of the "life-cycle" of care. However, apart from the right for mothers to request flexible working, the different policies on the range of care leaves and care services were not taken forward as legislative proposals. Instead, through the adoption of the report on the Barcelona Targets, the EU retained its focus on the provision of care services for pre-school children without acknowledgment of the need to expand care services. Caracciolo di Torella and Masselot are critical of the proposed amendments of the Pregnant Workers Directive, finding that the extension to 18 weeks was no further than that which was already in place in many Member States. They also note that the proposal for a right to request flexible working arrangements is weakened by not including a right to be granted a flexible working arrangement. Finally, they are critical of the lack of any rights for fathers either for leave after the birth of a child or to request flexible working arrangements.[230] The Package does not appear to deliver, despite appearances, on advancing binding reconciliation rights.

Overall, this phase experienced innovation and dynamism in EU policy and policy making however this was not matched by legislative activity. The OMC was a new way to overcome some of the tensions surrounding supranational social policy however its apparent success implies a risk of over reliance on its soft law style methods and the possibility that the future of social policy lies in convergence rather than hard law harmonisation and individual rights. The policy goals were ambitious; the 2000 Council Resolution on "The Balanced Participation of Women and Men in Family and Working Life" expressed a progressive vision of gender equality and work life balance. The Commission Communication included in the 2008 "Work-Life Balance package" was also forward – looking; in its approach to

[229] COM (2008) 600/4 Proposal to amend Council Directive 92/85/EEC, explanatory memorandum, 2008/xxxx (COD) p.3.
[230] Caracciolo di Torella and Masselot op. cit. *supra* note 100 at p.48.

care, it communicated the rights and services that could support care needs throughout the "life-cycle" in a broad and wide-ranging way. However, the legislative proposals did not live up to the dynamism of the policy rhetoric. The overall priority given to economic objectives inhibited the ability of the legislative proposals to pursue bold gender equality goals. Instead, the "Work-Life Balance Package", whilst it raises the profile of reconciliation and highlights the range of care needs that should be addressed, substantively, the legislative proposals do not significantly advance reconciliation. Furthermore, it will be seen in "Phase 4" that the Pregnant Workers Directive proposal, in fact stalls at the Council and is eventually withdrawn by the Commission.

Phase 4 A "New Start" for Reconciliation and the prominence of care, 2009 – Present

Introduction

This period was dominated by the need to create financial and political stability. The financial crash of 2008 followed by the UK's vote in 2016 to end its membership of the EU created political challenges that stymied legislative development in EU Social Policy. The most notable illustration of this stagnation is the failure of the Pregnant Workers Directive. The Commission's response has been to renew its appeal to citizens by seeking to strengthen the EU's social profile and as such it has launched the European Pillar of Social Rights.[231] It is unclear at this stage how the Social Pillar will evolve, particularly as it focuses on the participation of only Eurozone countries. However, strikingly, reconciliation measures, and specifically the concept of care, have been placed at the heart of this new EU social agenda.

Context

The phase opened with the coming into force of the Treaty of Lisbon. The Treaty confirmed the position taken earlier, by the EC Treaty, on social policy and gender equality.[232] It retains the objective of the EU as "a highly competitive social

[231] European Pillar of Social Rights cited *supra* note 114.
[232] The promotion of equality between women and men is listed among the tasks of the Union now Art. 3(3) TEU. The gender mainstreaming duty is now Art. 8 TFEU.

market economy, aiming at full employment and social progress…" [233] and it affirms the importance of gender equality in the Union by including "equality between women and men" in the common values on which the Union is founded.[234] A major change brought by Lisbon was the transformation of the Charter of Fundamental Rights ("the Charter") into primary law. The Charter was "proclaimed" in 2000 by the European Constitution.[235] With the coming into force of the Lisbon Treaty, the Charter became primary EU law, enjoying the same status as the Treaties and thus becoming legally binding on the EU institutions and on Member States when implementing EU law.[236] The concept of reconciliation was enshrined in Article 33 of the Charter whereby reconciliation became a self-standing right. Article 33(2) states,

> To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

The new status, as fundamental right, offers the potential to explore and develop the concept of reconciliation for instance through the interpretation of the ECJ. However, upon closer inspection, the careful drafting of the article may limit the potential to do so. For instance, the text distinguishes between the rights of mothers and fathers and enshrines the right of "*paid* maternity leave" for mothers but for fathers, only the right to (parental) *leave* is protected and, paternity leave is not mentioned. Explicitly structuring the right in this way appears to follow an older, narrower approach to reconciliation and rather than advocating shared caring roles, it contributes to the perpetuation of a gendered structure of care[237]. Furthermore, the drafting concentrates on leave surrounding the birth or adoption of a child, this does not contribute to a wide or dynamic interpretation of reconciliation which would include caring responsibilities for older children, the

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[233] Art. 3 TEU.
[234] Art. 2 TEU.
[235] Charter of Fundamental Rights of the European Union O.J. 2000, C364/1.
[236] Art. 6(1) TEU.
[237] This is not intended to detract from the need for maternity rights. For further discussion see Barbara 'The Unsolved Conflict: Reshaping Family, Work and Market Work in the EU Legal Order' Hervey and Kenner (Eds.) in *Economic and Social Rights under the EU Charter of Fundamental Rights,* (Hart, 2003).

elderly and other dependants. Nor does it signal that reconciliation may be achieved through the combination of rights to leave with other rights such as flexible working. Integrated strategies for achieving reconciliation were articulated in the 2008 Work Life Balance Package[238] however their omission in the Charter may be partly understood when it is remembered that the Charter was originally drafted prior to being first proclaimed in 2000. In some instances, such as Article 33, the Charter was perhaps somewhat out-dated by the time it came into force in 2009. Nevertheless, the Charter itself is still to realise its full potential[239] and it may yet evolve through clarification from the ECJ. However, whilst the textual limits of Article 33 do not appear to advance the concept of reconciliation[240] it has nevertheless given reconciliation a legal footing in EU primary law.

The political back drop to this phase was the unfolding global financial crisis. The crisis led to recession in many EU countries. Throughout this period the Council was focused on managing the crisis; the then President of the Council, President Van Rompuy described the Council as being occupied with "fire-fighting" and then "nurturing the fragile economy". [241] A regulation agenda was set concerned with financial reform, stabilising the situation, improving economic governance, and facilitating growth. Negotiations on these reforms were tense, it was difficult to find mechanisms that could accommodate the differences in Member States industrial relations and social models, made more difficult in a context where Member States financial capacity had diverged so dramatically. It was during this phase that the UK announced it would be holding a referendum on its membership of the EU. Necessarily, the Council throughout this period was keen to respond in a way that would demonstrate to its citizens and to the rest of the world that the EU

[238] COM (2008) 635 final cited *supra* note 222.
[239] For example, it is not clear in how far they are rights or mere 'principles' – a category of guarantees introduced by the Charter, the meaning of which has not yet been entirely defined by the Court of Justice.
[240] For further discussion of Art. 33 CFR see Barbera, op. cit. *supra* note 237 and Caracciolo di Torella and Masselot op. cit. *supra* note 100 at pp. 41 – 43
[241] European Council, The President, 'Remarks by President of the European Council Herman Van Rompuy following the Tripartite Social Summit', Brussels, 2014, EUCO 64/14, p.2. The first high level meeting of social partners, institutions, and member states.

was strong and united. While economic security was the main focus, appeals to citizens on social issues were made.[242]

In 2010, the EU social policy strategy, "Europe 2020" was launched. It set out the EU's ten-year jobs and growth strategy. It built upon the previous modernisation agenda of the Lisbon strategies (2000 and 2005) whilst modifying the targets in light of the financial crisis. It also prioritised measures to respond to rising unemployment and rising poverty. One of these priorities is entitled, "A Deeper and Fairer Economic and Monetary Union".[243] In 2015, President Junker, the new President of the Commission, announced plans as part of this priority, for a European Pillar of Social Rights.[244] The Pillar builds on, and complements, the EU social "acquis" in order to guide policies in a number of fields essential for well-functioning and fair labour markets and welfare systems. The principles proposed are not intended to replace existing rights, but offer a way to assess and, in the future, approximate for the better performance of national employment and social policies. Once established, the Pillar should become the reference framework to screen the employment and social performance of participating Member States, to drive reforms at national level and, more specifically, to "serve as a compass for the renewed process of convergence within the Euro area".[245] Currently, the Social Pillar identifies 20 essential principles three of which are relevant to the field of reconciliation, these are Principle 2 on Gender Equality, Principle 3 on Equal Opportunities, and Principle 9 on Work-life Balance.[246]

Throughout this period the Pregnant Workers Directive which had been one of the two legislative instruments put forward as part of the 2008 Work Life Balance Package, stalled at the Council. It was eventually withdrawn by the Commission in

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[242] European Council, 'The Bratislava Roadmap', contained in the 'Bratislava Declaration', 2016 *outlined the general objectives to 'make a success of the EU at 27', to respond to citizens' concerns and 'fears related to migration, terrorism and economic and social insecurity',* p.3.
[243] European Pillar of Social Rights cited *supra* note 114.
[244] European Pillar of Social Rights cited *supra* note 114.
[245] European Pillar of Social Rights cited *supra* note 114.
[246] European Pillar of Social Rights cited *supra* note 114, principle 9 *"[p]arents and people with caring responsibilities have the right to suitable leave, flexible working arrangements and access to care services. Women and men shall have equal access to special leaves of absence in order to fulfil their caring responsibilities and be encouraged to use them in a balanced way.*

July 2015 and not replaced.[247] In the vacuum that was created by the stagnation and ultimate failure of the Pregnant Workers Directive, and invigorated by the launch of the Social Pillar, the Commission, in August 2015, launched a new Roadmap on reconciliation, it was branded as a "New Start to address the challenges of work –life balance faced by working families".

Policy Goals

Like the Roadmap that came before in 2006[248] and that led to the 2008 Work Life Balance Package, the "New start to address the challenges of work –life balance faced by working families" Roadmap is the precursor to a package of proposals on reconciliation. Unlike the 2006 Roadmap which was a broad initiative on gender equality more generally, the "New start" Roadmap is dedicated to reconciliation, specifically, the "better balance [of] caring and professional responsibilities".[249] As such it offers a more detailed identification of the challenges and justifications for EU action in the area of reconciliation.

The intention of the "New start" Roadmap is to propose a number of options; a mixture of legislative and non-legislative measures to form the basis of consultations with the European Parliament, Member States, the Social Partners, stakeholders and non-governmental organisations and the public. The suggestions involve six legislative measures including a combination of strengthening implementation and updating existing rights, the introduction of a measure on the right to request flexible working arrangements and the introduction of a measure on a "Carers' Leave" for carers of elderly or ill dependants. The non-legislative measures that are suggested include the development of a comprehensive policy framework in the field of reconciliation that builds on the existing legal and policy acquis, that will address a wide range of policies to support parents' participation in the labour market. Specifically, a new benchmark system that would be modelled on the Barcelona child care targets but one that would take a holistic assessment of the range of elements that contribute to successful reconciliation,

[247] Withdrawal of Commission Proposals, 2015, O.J. (2015/C 257/10).
[248] COM (2006) 92 cited *supra* note 228.
[249] European Commission, "New start to address the challenges of work-life balance faced by working families", at p. 1, Roadmap, 2015, 2015/JUST/012.

namely: care infrastructure availability, accessibility and quality, for child and other dependent persons and, incentives and disincentives in tax and benefit systems. Other measures suggested are classic soft law measures including setting up a regular monitoring and public reporting system for Member States, the targeted use of the European Social Fund and the promotion of dialogue and awareness raising campaigns.

The New Start Roadmap marks significant shifts in thinking on the issue of care. The language adopted now refers to "care" explicitly, there is an emphasis on gender equality and shared caring roles and, a wide range of people with care needs are considered. The Commission's use of the language of care, rather than maternal, parental, or paternal rights, enables a broader consideration of caring responsibilities: it increases the group of people that reconciliation policies are aimed at, from women and to an extent parents to: "parents with children or workers with dependent relatives." This group does not refer to women separately and by referring to "parents" and "workers" it clearly envisages men's involvement in caring responsibilities and reconciliation policies.[250] Similarly, the phrase "work-life balance" has been adapted and now refers to the need to "better balance caring and professional responsibilities".[251] The range of care needs that have been considered is also broader. By identifying "dependent relatives" as well as "children", for whom people have caring responsibilities, the Commission acknowledges the life-cycle nature of care needs.[252] The significance of this shift in language to "care", shared gender roles and a life-cycle approach to care, appears to reflect a more intense concern with the relationship between care and society. Specifically, the Commission may be responding to the increasingly pressing concern of the ageing demographic and the challenge of providing long term care for the elderly.[253] This is demonstrated by the suggestion of a "Carers' Leave", a form of leave intended for those who care for elderly or ill dependents. This is also evident in the idea for a comprehensive policy framework

[250] Roadmap cited *supra* note 249 at p.3.
[251] Roadmap cited *supra* note 249 at p.3.
[252] Roadmap cited *supra* note 249 at p.3.
[253] See for example, Spasova, Baeten, Coster, Ghailani, Peña-Casas and Vanhercke, "Challenges in long-term care in Europe. A study of national policies", 2018, European Social Policy Network (ESPN), Brussels: European Commission.

that advocates for going beyond the Barcelona childcare targets to include a care infrastructure for other dependent adults. Overall, the New Start Roadmap is the most comprehensive consideration of peoples' caring responsibilities yet. However, the justification, made in the Roadmap, for EU action is made solely on economic grounds which suggests that the concern is about the impact of care on the economy, and less about the fairer distribution of caring responsibilities and gender equality.

The Roadmap explains that the main reason for the initiative is the problem of women's low participation in the labour market which represents, according to the Commission,

> A waste of resources for the EU economy and sub-optimal allocation of skills and competences acquired by women with negative effects on overall productivity and competitiveness.[254]

The justification for EU level action aimed at increasing women's participation in the labour market is made with reference to the Europe 2020 strategy priority, of, "growth and jobs", in particular the achievement of the employment target of 75%. The Commission claim that there is a "strong economic case" for action and include the gender pay gap and the gender pension gap as consequences of inaction. The need for EU-wide action is grounded in the Treaties, in doing so the Commission invokes the justifications used at the time of the Treaty of Rome for including the principle of equal pay in the Treaty. They reference the need to ensure competitiveness between Member States economies by avoiding downward competition between Member States in labour and equal treatment matters which could occur if Member States hesitated in regulating on reconciliation matters should it put their own companies at a disadvantage with companies from other Member States. The Roadmap maintains that the means through which poor female labour market participation may be addressed are reconciliation measures. This is because, it explains, that evidence links women's lower employment rates to caring for children. In particular, the Commission explain that women work fewer hours in paid employment, and a higher proportion work part-time because of their

[254] Roadmap cited *supra* note 249 at p.3.

caring responsibilities. The emphasis that the Roadmap places on the economic case is intentional. The Commission is keen to avoid the same stagnation that the Pregnant Workers Directive experienced. Strong economic justifications are intended to prevent the issues from being side-lined as soft issues and furthermore, to avoid Member States blocking the measures on account of a resistance to EU level social policy.[255]

What the Roadmap gains in making a strong economic case for reconciliation policies, it loses in the advancement of gender equality. The "twin aim" of economic integration and gender equality rhetoric, once prevalent in EU discourse, is absent.[256] The New Start Roadmap, despite the new language, is not an overhaul of the existing approach; gender equality remains a secondary consideration. Should the Commission maintain this approach, it risks prolonging existing assumptions or shortcomings for example, men's poor participation. The need to encourage and enable men to use leave and flexible working opportunities to better distribute caring responsibilities is mentioned however the justification for this is not gender equality, but rather it is to increase productivity by enabling women's participation in the workforce. Neither does it reflect on the evidence that points to the need to provide adequate compensation to men when they take leave, which is the main reported reason for men's poor uptake of existing leaves.[257] Overall, the use of reconciliation measures has been co-opted by the New Start Roadmap, it no longer represents a double aim, which is both economic and social but rather, the consequential outcome of gender equality is the means to the end of achieving economic growth. The Commission may be prudent in having a strategy for success at the Council, one that focuses on the overarching

[255] Interview with Commissioner for Justice, Consumers and Gender Equality Vera Jourova in Heath, "Maternity Leave's Pregnant Pause", (2015), Politico available at <http://www.politico.eu/article/europe-bailout-women-jourova-employment-equality/> (last visited 17 Aug. 2020).

[256] See above "Origins of gender equality in EU law and policy" and making a similar point, Masselot, "The EU childcare strategy in times of austerity", 2015, 37(3) *Journal of Social Welfare and Family Law*, 345 – 355 at p.353.

[257] See for example: Castro-García, Pazos-Moran, "Parental leave policy and gender equality in Europe", 22 (3) *Feminist Economics,* (2016), 51-73, and Duvander, Johansson, "What are the effects of reforms promoting fathers' parental leave use?" 22 (3) *Journal of European Social Policy*, (2012), 319-330, and Caracciolo di Torella, "Men in the work/family reconciliation discourse: the swallows that did not make a summer?", 37:3 *Journal of Social Welfare and Family Law*, (2015), 334-344.

objectives of jobs and growth and, that will overcome the challenges experienced by the Pregnant Workers Directive. However, if the proposed measures, that come from the New Start Roadmap, fail to respond to the gender-based challenges that exist with a gender equality based response, then their success, once implemented, will be limited and there is a risk that the gendered roles surrounding paid work and unpaid care will be reinforced.

Before making proposals, there was a period of consultation and institutional engagement. The Commission carried out a series of consultations based on the New Start Roadmap. In 2016 the Commission completed the consultations with the European social partners. There was no agreement among the social partners to enter into negotiations but the Commission proceeded to take action, "taking into account the outcome of those consultations" and the views expressed in an open consultation with citizens and stakeholders. [258] The Council held a discussion on work life balance in 2015 and the European Parliament adopted the report of the Committees on Employment and Social Affairs and, Women's Rights and Gender Equality on, "Creating Labour Market Conditions Favourable to Work-Life Balance".[259] What followed this period of engagement was, in 2017, the Commission's *Initiative To Support Work-Life Balance For Working Parents And Carers*.[260]

The Initiative To Support Work-Life Balance For Working Parents And Carers[261] ("Work Life Balance Initiative") proposes a set of legislative and non-legislative actions intended to 'modernise the existing European Union legal and policy framework to support better work-life balance for men and women with caring responsibilities and a more equal use of leave and flexible work arrangements'.[262] The Commission have identified three priority areas for action, they are, "improving the design and gender-balanced take-up of family related leaves and flexible working arrangements", "improving the quality, affordability and access to childcare and long-term care" and, "addressing economic disincentives for parents

[258] Directive (EU) 2019/1158 cited *supra* note 109 at the preamble, Clause 14.
[259] European Parliament, "Report on creating labour market conditions favourable for work-life balance", 2016, A8-0253/2016.
[260] COM (2017) 252 final, cited *supra* note 152.
[261] COM(2017) 252 final, cited *supra* note 152.
[262] COM(2017) 252 final, cited *supra* note 152, at p.2.

and carers to work".[263] Within these areas for action they propose a Directive on Carers Leave, which aims to improve the work life balance of parents and carers, building upon existing rights, in particular the Parental Leave Directive and contains rights relating to increased and paid parental leave, paid paternity leave following the birth of a child, paid carer's leave of 5 days per year to care for a sick or dependent relative and, the right to request flexible working arrangements for parents or workers with caring responsibilities.[264] As expected from the Roadmap, the non-legislative measures include improved monitoring of the transposition of the legislative measures, improved data collection, capacity building activities, information and awareness raising campaigns, best practices sharing and, the provision of new funding and support to ensure that existing EU funds are used to support work-life balance measures.[265] As such the Work Life Balance Initiative sets out a coherent strategy of interlinking fields of action with a corresponding framework of legislative and non-legislative measures.

Since the New Start Roadmap, the Commission committed to a legal basis for the proposed measures, and significantly this is Article 153 (1)(i) TFEU, which states that, the Union shall support and complement the activities of the Member States in the field of equality between men and women with regard to labour market opportunities and treatment at work.[266] With this and in a marked change of tone from the New Start Roadmap, a renewed and bold commitment to gender equality can be seen throughout the Work Life Balance Initiative. The Initiative opens by identifying the underemployment of women across Europe despite women being increasingly well qualified. This, they explain, is due to the failure of existing policies that have not brought "equal opportunities that allow fathers and mothers to work and care together for the welfare of children and society at large".[267] This issue is linked with the ageing demographic and the persistence of the gender pay gap and gender pension gap, which they maintain, can lead to social exclusion and

[263] COM(2017) 252 final, cited *supra* note 152, pp. 8-15.
[264] COM (2017) 252 final, cited *supra* note 152, p. 11, and COM/2017/0253 final, 2017/085 (COD), Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.
[265] COM(2017) 252 final, cited *supra* note 152, pp.8-15.
[266] COM(2017) 252 final, cited *supra* note 152, p. 2, and Directive (EU) 2019/1158, cited *supra* note 109.
[267] COM(2017) 252 final, cited *supra* note 152, p.2.

risk of poverty. This initiative is aimed at addressing women's underrepresentation in the labour market and supporting their career progression through an updated work life balance policy. This is balanced by identifying the overarching benefit to employers of improved employees' wellbeing leading to better retention of employees, improved motivation and productivity, less absenteeism and wasting talent and a more diversified workforce. The Commission envision that the initiative will contribute to improving employment rates and to reducing poverty and social exclusion and therefore they align the initiative with EU priorities reflected in the Europe 2020 targets, and with the Commission's priorities of jobs and growth. It is also a key deliverable of the European Pillar of Social Rights[268] and is identified as part of the implementation of the Commission's Strategic Engagement for Gender Equality 2016-2019 and of UN Sustainable Development Goal 5 on gender equality. It will, the Commission assert "strengthen the social dimension of the Union".[269] The Commission justify action in this field on the basis of "fairness, gender equality and optimal allocation of skills" whilst adding that it is also "a question of countries' fiscal sustainability", they claim that there is thus "both a social and an economic imperative".[270] The imperative for action is framed as both social and economic with the social dimensions receiving prominence throughout the document. The problems that the Work Life Balance Initiative seek to address and the justifications for action are all based on gender equality goals. The departure in this sense from the New Start Roadmap is remarkable: gender equality is the legal basis for action and gender equality is the point on which the Work Life Balance Initiative pivots.

The focus, on care, taken by the New Start Roadmap is retained and it continues to be an inclusive concept, which seeks to reconceptualise the notion of care from the image of mother and child to being a broader societal concern that includes: the role of both parents' in child-care responsibilities, the care needs of other dependent relatives and, the increasing care responsibilities associated with the

[268] European Pillar of Social Rights cited *supra* note 114.
[269] COM(2017) 252 final, cited *supra* note 152, p.3.
[270] COM(2017) 252 final, cited *supra* note 152, p.2.

ageing demographic.[271] The Work Life Balance Initiative embraces the New Start Roadmap's narrative of care and presents the problem of the imbalance in the share of unpaid care work and women's low participation in the labour market as a gender equality problem. What is distinctive about the Work Life Balance Initiative is that it presents the consequences of inaction as further entrenchment of gender inequality, it claims that,

> Reduced earnings, higher concentration in part-time work and career gaps linked to caring responsibilities' for women entrench gender inequalities over time and lead many women to become economically more dependent on their partners or the state, resulting in a higher 'risk of exposure to poverty and social exclusion'.[272]

Rather than, as the Roadmap did, claim that the consequences of an inadequate response leads to "a waste of resources for the EU economy … with negative effects on overall productivity and competitiveness".[273] The Work Life Balance Initiative presents gender balanced sharing of unpaid care and overall improved gender equality as a goal in and of itself.

The shift towards gender equality in the Work Life Balance Initiative is remarkable and it informs the framework of solutions that the Commission propose. Rather than using economic growth and the need for women's participation in the labour market to frame the proposals, the Commission reflects on the success of reconciliation measures to date. It grounds its response in the evidence, including an ILO global survey that show that both women and men would prefer that women work in paid jobs[274] and it bases the priority areas of action on evidence that demonstrates the importance of adequate family leave arrangements, the availability and use of such arrangements for fathers; the availability of flexible working arrangements, the availability, accessibility and affordability of childcare

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[271] COM(2017) 252 final, cited *supra* note 152, pp. 4-5. See also Caracciolo di Torella, "An emerging right to care in the EU: a 'New Start to Support Work-Life Balance for Parents and Carers'", 18 ERA Forum (2017), 187–198.
[272] COM(2017) 252 final, cited *supra* note 152, p.5
[273] Roadmap cited *supra* note 249 at p.3.
[274] ILO, "Towards a better future for women and work: Voices of women and men" World Gallup Poll, 2017 (available at < http://ilo.org/global/publications/books/WCMS_546256/lang--en/index.htm> cited in COM(2017) 252 final, cited *supra* note 152, p 5.

and long-term care and; the existence of disincentives for women to stay or enter into work such as tax-benefit disincentives and high costs for childcare and long-term care services.[275]

Overall, the Commission's renewed approach to reconciliation, as set out in the Work Life Balance Initiative, is "innovative".[276] The issue is now located squarely within the field of gender equality and signals a move away from the persistent tension created by the differing legal bases of health and safety versus gender equality that has led to a piecemeal and inadequate set of responses to this issue.[277] Whilst the primary emphasis is on enabling women to enter and remain in the labour market, the narrative of care is strong and inclusive and the solutions proposed are based on supporting a gender balanced share of unpaid caring work. Notably the Commission claim that they seek to "give workers more opportunities and choice to balance their professional and care responsibilities" perhaps laying a marker for the future development of this field that could lead to a "right to care".[278] The outcome of the proposals, specifically the individual rights contained in the proposed Directive, require scrutiny for the real difference to peoples' lives that will be made, however it is perhaps its potential and the future significance that the Work Life Balance Initiative has that is the most "ground breaking".[279] This is because for the first time it draws together an overarching strategy and framework of measures on reconciliation, one that is based on gender equality and it places care and society's response to care needs firmly and prominently at the heart of this agenda.

The legislative reality

The Directive on work life balance for parents and carers, was proposed by the Commission in 2017 as part of the Work Life Balance Initiative. It was successfully adopted by the Council in June 2019. The legal basis is point (b) of Article 153(2), in conjunction with point (i) of Article 153(1) which states that the Council may

[275] COM(2017) 252 final, cited *supra* note 152, pp. 5-6.
[276] Caracciolo di Torella, op. cit. *supra* note 271.
[277] Busby, "The Evolution of Gender Equality and Related Employment Policies: The Case of Work-Family Reconciliation", 18, 2-3, International Journal of Discrimination and the Law, vol. 18, 104-123 at p.120.
[278] Caracciolo di Torella, op. cit. *supra* note 271 and Busby, *A right to care?: unpaid care work in European employment law,* (OUP, 2006).
[279] Caracciolo di Torella, op. cit. *supra* note 271.

adopt Directives in the field of equality between men and women with regard to labour market opportunities and treatment at work. Clause (6) of the preamble states that,

> Work-life balance policies should contribute to the achievement of gender equality by promoting the participation of women in the labour market, the equal sharing of caring responsibilities between men and women, and the closing of the gender gaps in earnings and pay. Such policies should take into account demographic changes including the effects of an ageing population.[280]

In doing so this Directive is intended to complement, strengthen, and replace the rights contained in Directive 2010/18/EU regulating parental leave. To achieve this the Directive lays down minimum requirements related to four individual rights including, paternity leave, parental leave, and carers' leave, and to flexible working arrangements for workers who are parents, or carers.[281]

The right of paternity leave, for fathers and equivalent second parents, includes 10 working days of leave to be taken on the occasion of the birth of the worker's child. Member States may determine whether to allow paternity leave to be taken partly before or only after the birth of the child and whether to allow such leave to be taken in flexible ways.[282] Whilst this is not a controversial right as it is present in most Member State's systems, it is the first time that it has been placed on an EU law footing and brings it into line with ECJ case law.[283] The right of parental leave has been strengthened in response to a low uptake of the right under Directive 2010/18/EU. The right is still for 4 months to be taken up to the age of 8 years old (or an age specified by Member States)[284] however now, to encourage fathers to use the leave, 2 months are non-transferable.[285] Furthermore, Member States shall take the necessary measures to ensure that

[280] Directive (EU) 2019/1158 cited *supra* note 109 at the preamble, Clause 6.
[281] Directive (EU) 2019/1158 cited *supra* note 109 at Art. 1.
[282] Directive (EU) 2019/1158 cited *supra* note 109 at Art. 4.
[283] Case C-222/14 *K. Maïstrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton*, EU:C:2015:473; see also the Opinion of AG Kokott in Case C-104/09 *Roca Álvarez v Sesa Start España ETT SA*, EU:C:2010:254. See also Caracciolo di Torella cited *supra* note 271 at p.191 – 192.
[284] Directive (EU) 2019/1158 cited *supra* note 109 at Art. 5(1).
[285] Directive (EU) 2019/1158 cited *supra* note 109 at Art. 5(2) .

workers have the right to request that they take parental leave in flexible ways.[286] The right to carers leave of 5 days per year is introduced by the Directive and until now there has been nothing of this kind.[287] It is intended to be for workers in order to provide personal care or support to a relative, or to a person who lives in the same household as the worker, and who is in need of significant care or support for a serious medical reason, as defined by each Member State.[288] The right to request flexible working arrangements has been expanded and it is for workers with children under at least 8 years old (the age to be specified by Member States), and carers and it includes the right to return to the original working pattern at the end of the agreed flexible working period.[289] Whilst this right is perhaps the weakest of the Directive's innovations as it is already included in the part-time workers Directive[290] and, it is simply a right of request, it is nevertheless important that it is included here, given the wealth of evidence that points to increased flexible working as crucial to those with caring responsibilities, particularly women, to remain in work and, it is the first time that it has been linked to caring responsibilities.[291]

The Directive on work life balance for parents and carers sets out a clear structure for the individual rights that support the equal take up of leaves and the sharing of caring responsibilities. However, it does not sufficiently address the persistent weakness of previous reconciliation measures. Where fathers take up of care based leaves have been extremely low[292] evidence points to the solution in this area to be on the one had "use it or loose it" policies of non-transferability of leave but primarily the affordability of leave for families to enable men to take up the rights.[293] On this issue, the 2019 Directive is weak. In the Commission's draft Directive, proposed to the Council, payment was included for all three leaves,

[286] Directive (EU) 2019/1158 cited *supra* note 109 at Art. 5(6).
[287] Directive (EU) 2019/1158 cited *supra* note 109 at Art. 6.
[288] Directive (EU) 2019/1158 cited *supra* note 109 at Art. 3(1)(c).
[289] Directive (EU) 2019/1158 cited *supra* note 109 at Art. 9(1) and Art. 9(3).
[290] Clause 6, Council Directive 97/81/EC cited *supra* note 141, and see Caracciolo di Torella cited *supra* note 271 at p.190.
[291] See further Caracciolo di Torella, op. cit. *supra* note 271 at p.193.
[292] Van Belle, "Paternity and Parental Leave Policies across the European Union", RAND Corporation, Santa Monica and Cambridge, 2016 at pp 9-11.
[293] OECD, "Parental Leave: Where are the fathers?", Policy brief, 2016 and; Van Belle, cited *supra* note 292.

paternity, parental and carers leave and, for it to be at rates equivalent to sick pay.[294] However, the Council agreed that only paternity leave must be compensated at sick pay rates. Instead, payment or allowance for parental leave is to be defined by the Member State or the social partners and shall be set "in such a way as to facilitate the take-up of parental leave by both parents".[295] There is no mention of pay for carers leave at all. Therefore, there should be low expectations of the actual difference in the gendered take up of leaves. In reality, relatively small amounts of compensation for either single or dual earner households is not likely to significantly alter behaviours or "cultural norms".[296] Without any pay attached to carers' leave, it is most likely women who will use this leave thereby undermining the potential of the Directive to redistribute caring responsibilities and risks further entrenchment of existing gender roles. Furthermore, by offering 5 days per year for carers leave, it is a leave that appears to be designed as a leave for emergencies and not as one that will provide support for those with ongoing caring responsibilities.[297] This means that the new "carers leave" becomes more of a symbolic move towards acknowledging a broader range of caring responsibilities, beyond parent and child. The Directive aims to respond to the ageing demographic, but the individual rights continue to privilege parents and young children[298] and without more robust means of motivating fathers to take the leave options through adequate pay, the individual rights in the Directive fall short of being able to genuinely disrupt the gendered patterns of paid work and unpaid care. Instead to appreciate the value of the Directive, it needs to be seen in the context of the Work Life Balance Initiative and the potential the new overarching strategy and framework has.

Analysis

The Work Life Balance Initiative was born of the failure of the Pregnant Workers Directive and belongs to a trajectory within EU Social Policy that has suffered from

[294] COM/2017/0253 cited *supra* note 264.
[295] Directive (EU) 2019/1158 cited *supra* note 109 at Art. 8(3).
[296] Busby, op. cit. *supra* note 277 p. 119.
[297] Caracciolo di Torella, op. cit. *supra* note 271 at p.190 and Busby, op. cit. cited *supra* note 277 p.119.
[298] Caracciolo di Torella, op. cit. *supra* note 271 at p.190.

compromise and stagnation. The outlook for a "new start" was, when taking a historical view of the field, bleak. In fact, the New Start Roadmap, whilst transforming the narrative of care appeared to cling onto the broader EU economic goals and subordinate the ambition of gender equality and its ability to create change. However, the Work Life Balance Initiative offers a distinctive break from this pattern and its main value should be seen in its significant contribution to the ongoing shifts in mindsets where care can be more broadly understood as an unavoidable part of society and as a universal responsibility. The Directive is the first step in legislation that brings together concrete rights and that gives men a central role in the reconciliation of work and care. Perhaps the biggest contribution of the Work Life Balance Initiative and the successful passage of the Directive at the Council, is the claim that its intention is to "change … mind-sets at organizational and societal level"[299] and as such it has renewed the EU social agenda and placed care at the heart of it. It has reconceptualised how care is understood from initially a matter for mother and child, to a far reaching and inclusive concept that involves men and women, and their care needs and responsibilities throughout the life cycle. It has successfully underpinned the strategy and based the legal framework upon gender equality. It has framed the challenges involved in meeting todays care needs and of combining unpaid care with paid work, as being rooted in gender inequality. And, that these challenges require solutions that seek to disrupt gender inequality and transform gender roles. This sets the tone for the future, for implementation, interpretation and the development of the rights contained in the Directive and the strategy as a whole.

Conclusion

In summary, the historical overview in this chapter has charted the visibility of unpaid care, beginning with the origins of the EU and the principle of gender equality in the Treaty of Rome in Article 119 on equal pay. Connections between gender, care and the labour market were then made in the Social Action Plan of 1974. The Action Plan included the priority of equal treatment between women and men and through this theme, the concept of the "reconciliation between work and family life" was introduced into Community policy. It is through the

[299] COM(2017) 252 final, cited *supra* note 152, p.17.

reconciliation agenda that unpaid care has become politicised and visible at EU level. It was conceived of relatively early on in EU discourse and has proven to be a high-profile agenda for the EU, generating significant policy and legislative activity. But the visibility of unpaid care has not been constant or consistent and the measures that have resulted have not always been hard law rights that are able to transform gender roles associated with unpaid care.

High points in the evolution of the principle of reconciliation include the politicisation of care at EU level. The Work Life Balance Package in 2008 was an example of bold policy thinking that communicated the importance of interconnected policies in achieving reconciliation and emphasised the role of men. The approach that it advocated included a range of leaves: paternity leave, adoption leave and leave to care for other family members, to be supported by arrangements such as flexible working and care facilities for dependents as well as for children. There has also been success in the creation of hard law measures that have contributed to important rights in furthering the reconciliation agenda, including the Pregnant Workers Directive 92/85/EC, the Parental Leave Directive 2010/18/EU, the Equal Treatment Directive 2006/54/EC, the Self-employed workers Directive 2010/41/EU and Directives on part time work, Directive 97/81/EU, Working Time Directive 2003/88/EU and on fixed term work, Directive 99/70/EU. However, EU Social Policy has been dogged by a legacy of tensions that has seen it expand and contract over time as it shares or gives way to an economic objective. The challenge that this has presented has often led to compromises. Reconciliation has evolved without a clear legal basis in the Treaty and so strategies have been used to progress the field in novel ways, such as basing the Pregnant Workers Directive 92/85 on the health and safety Article 118a of the EC Treaty (now Art. 137). Whilst this enhanced pregnant women's rights, the scope of the health and safety measure meant that it was not driven by gender equality and that it could not include men's role in the framework of rights and protections. Other legislative measures have encountered challenges at the Council, where there is a tendency to enshrine the level of rights already in place in Member States rather than extend them through EU law, with contestation often centred on the question of money. For example, there may be support within the Council for the right to care based leave but not for the right to pay during care based

leaves. A low point, in the evolution of EU Social Policy and the principle of reconciliation was the stagnation and ultimate withdrawal of the update to the Pregnant Workers Directive 92/85, in 2015.

In general, in times of economic turmoil, including recessions or high unemployment, Member States appear to retreat from EU Social Policy. Furthermore, there has been a sense of saturation with social policy. A feeling that "it", reconciliation, and gender equality, "has been done". This has led to periods of stagnation. However, these periods of stagnation have often led to innovation where the Commission has sought to overcome these challenges. One innovation is that the Commission proceeds with soft law measures, these have a positive effect in many ways particularly raising awareness and enhancing visibility. However, they lack the transformative capacity of hard law measures. One further, logic is to frame reconciliation within an economic objective to appeal to Member States at the Council. However, this is self-limiting because if proposed solutions fall short on their gender equality objectives, they lose their transformative potential. Without a robust commitment to gender equality, such measures cannot realise a meaningful gender equality.

Most recently, the Work Life Balance Initiative brings together a lot of the progress. It is significant in its politicisation of care needs and it advances gender equality as an objective in and of itself rather than making an economic justification for action. Using gender equality as the legal basis it sets bold gender equality objectives and has a lot of potential on account of the broad and inclusive thinking on care. It renews the relevance of reconciliation because it highlights the ageing demographic and raises the profile of men's involvement. It does all this within one coherent strategy and framework. The legislative output, the Work Life Balance Directive 2019/1158 is a big achievement in the context of the failure to amend the Pregnant Workers Directive. But the rights are not ground-breaking. The Directive lays down minimum requirements related to four individual rights including, paternity leave, parental leave and carers' leave, and to flexible working arrangements for workers who are parents, or carers. However, the payment of care based leaves proves to be a persistent problem and the suggestion in the Commission's proposal for all of the leaves to be paid was not accepted by the

Council. The result is a weaker system of payment where only payment for paternity leave is defined and the new carers leave has no mention of payment at all. The risk is that without sufficient pay attached to care based leaves, the uptake will most likely be by women therefore undermining the potential of the Directive to transform the distribution of caring responsibilities and risks further entrenching the existing gender roles.

To sum up, at this juncture in time, the EU's contribution to making unpaid care more visible is significant. Unpaid care has distinctly shifted to the political domain. It is the subject of political debate and it is a matter of "official political" concern where the institutions are involved in responding to the needs associated with unpaid care work.[300] There have been decades of engagement on the matter, between institutions, Member States and informal actors such as the Social Partners. New methods and policy innovations have led to soft law measures which have increased visibility, and policy thinking has continued to evolve. Unpaid care needs have gone through a process of continuous, (although not necessarily consistent) interpretation, culminating in the Work Life Balance Initiative. The priority given to care, and the commitment made to gender equality in this Initiative is remarkable and it has the potential to be far-reaching. In terms of transformative individual rights, they have not arrived. There is more potential than ever with the Work Life Balance Directive 2019/1158 being framed by gender equality. However, long-standing obstacles persist. Providing for pay, in legislation, is a problem and therefore the affordability of care-based leaves, necessary to encourage men to take them, has been sacrificed. The transformative quality of the rights on the table now, is limited.[301] Whilst the policy discourse has elevated the visibility of care, the legal framework fails to elevate the status of care. The legal rights do not deliver on increasing the value of care. The Commission hopes that the Work Life Balance measures will contribute to a cultural shift in attitudes towards gender and care, and it is here that we may have to look, first, for signs of transformation.[302] A possible necessary step before

[300] See Chapter 2 pp 23- 26 discussion of "visibility" and Fraser, op. cit. *supra* note 59.
[301] See Chapter 2 pp 26 – 31 discussion of "transformative rights" and Fraser, op. cit. *supra* note 37.
[302] COM (2017) 252 final, cited *supra* note 152, p.17.

hard law rights will be achieved. The discussion in the next chapter focuses on the doctrinal analysis of EU free movement of persons' law.

Chapter 4 Care on the Move – Care, Free Movement and Union Citizenship

Introduction

This chapter focuses on the relationship between gender, care, and EU free movement of persons' law. This field began as the free movement of workers. The movement of labour or "factors of production", [303] was, along with the other fundamental freedoms, conceived of as an economic tool, critical to the establishment of the European single market.[304] However, a social dimension was soon introduced, to acknowledge the human experience involved and to encourage participation,[305] including, prominently, the right of the worker to be accompanied by their family and for the family to enjoy certain rights and protections in the host state.[306] Incrementally, the development of these social aspects has continued, most significantly with the advent of Union citizenship which has broadened the personal scope of free movement to potentially all Union citizens.[307] Furthermore, there is the inherent intention that the rules keep pace with society and be interpreted "in the light of present day circumstances", taking the "modern reality" of the Union into account which has led to the expansion of certain rights.[308] However, access to free movement rights remains largely tied to

[303] Hervey, "Migrant workers and their families in the European Union: the pervasive market ideology of Community law" in Shaw and More (Eds.), *New Legal Dynamics of European Union* (OUP, 1995), pp. 91-110 at 105.
[304] Treaty of Rome (EEC).
[305] For example, case law on access to social and tax advantages: Case C-32/75, *Cristini v SNCF,* ECLI:EU:C:1975:120; case law on family and education rights: Case C-76/72, *Michael S v Fonds national de reclassement social des handicapés*, ECLI:EU:C:1973:46; Case C-9/74, *Echternacht*, ECLI:EU:C:1974:74; Case C-7/94 *Lubor Gaal*, ECLI:EU:C:1995:118; and case law on rights of returning migrants and family, Case C-370/90 *Singh* ECLI:EU:C:1992:296.
[306] Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community *O.J.1968, L 257.*
[307] Art. 20 and 21 TFEU (introduced by Maastricht); Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, EU:C:2001:458 the Court ruled: 'Union citizenship is destined to be the fundamental status of nationals of the Member States'.
[308] Case C-673/16, *Coman, and others v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne*, Advocate General Opinion, ECLI:EU:C:2018:2 para 56, see also Case C-413/99, *Baumbast and R v Secretary of State for the Home Department*, Advocate General Opinion ECLI:EU:C: 2001:385 para 20.

notions of "work", labour market participation and economic independence and this has consequences for women's experience.[309]

There is limited data available on intra-EU mobility. The Gender Dimension of Geographic Labour Mobility in the European Union Report states that what can be drawn from the data is that male mobile Union citizen labour market participation is comparable to national male labour market participation.[310] However, the rate of female mobile Union citizen participation in the labour market is not comparable to national levels and is much lower than national rates. In fact, some of the practical challenges that women face, of combining work and care, are exacerbated by exercising free movement rights, for example, the availability of childcare allowing her to return to work when she is removed from her informal family structures of care. European Commission research finds that, of those mobile Union citizen women, who are not economically active in the host state, half of those women are not working because of their childcare responsibilities.[311]

This chapter discusses the legal framework governing EU free movement of persons in the context of the issues surrounding unpaid care work and gender equality, and it explores the impact of the legal rules on women with caring responsibilities. The chapter is organised into three themes, namely, how the rights operate in the host state when, firstly, women are full time carers, secondly, when women combine paid work with unpaid care and, thirdly, how the family rights within the free movement rules support women when they have caring responsibilities. Each theme considers the visibility of unpaid care work and evaluates the legal rights in force. In doing so, it aims to provide a structured analysis of the extent to which EU free movement of persons law acknowledges unpaid care work, and how this affects women's access to rights. Before this discussion, the legislative framework

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[309] Ackers, "Citizenship, migration and the valuation of care in the European Union", (2004) 30:2 *Journal of Ethnic and Migration Studies*,373-396 and Hervey, op. cit. *supra* note 303.
[310] "The Gender Dimension of Geographic Labour Mobility in the European Union" Report cited *supra* note 29, p.11.
[311] ICF GHK and Milieu Ltd, "Fact finding analysis on the impact on Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence", at p.60, Report for DG Employment, Social Affairs and Inclusion via DG Justice Framework Contract, 2013, available at <https://ec.europa.eu/employment_social/empl_portal/facebook/20131014%20GHK%20study%20web_EU%20migration.pdf> (last visited 21 August 2020).

of the free movement is presented, and the hierarchical nature of the rules is explained.

The Free Movement of Persons Legal Framework

The EU free movement *acquis* has its origins in the Treaty of Rome and has built up over several decades of accumulating legislation and case law. The Treaty of Lisbon now contains Article 18 TFEU enshrining the principle of non-discrimination on the basis of nationality, Article 45 TFEU governing the free movement of workers, Article 20 TFEU establishing Union citizenship, and Article 21 TFEU providing for the right of EU citizens to move to and reside in another Member State.[312] Free movement is also recalled in Article 45 the Charter of Fundamental Rights of the European Union.[313] In 2004, the "Citizen's Rights Directive", Directive 2004/38/EC, consolidated much of the secondary legislation and case law at the time into one directive.[314] Recital 2 of the Directive refers to the free movement of persons as one of the "fundamental freedoms of the internal market" and the Directive is intended, according to Recital 3 "to simplify and strengthen the right of free movement and residence of all Union citizens". It is the core piece of legislation, providing a framework for the free movement and residence rights of Union citizens in a host Member State. The provisions set out three phases of residence that Union citizens can enjoy in the host state, the first phase, set out in Article 6, is the first three months of residence in the host state and it is not subject to any conditions or formalities.[315] The second phase, set out in Article 7, is for a period of residence beyond three months.[316] During this period all Union citizens have the right of residence if they are workers, self-employed persons, if they otherwise have sufficient resources for themselves and their family members or, subject to certain further conditions, if they are students. Family members, of such Union citizens, irrespective of nationality, can also reside for this period and their right is automatic where the Union citizen meets the criteria listed in Article 7. Such family members include the spouse or registered partner of the Union

[312] Treaty on the Functioning of Europe, 2009, O.J. C 306, 17.12.2007.
[313] Charter of Fundamental Rights of the European Union, 2009, *O.J. C 326, 26.10.2012*.
[314] Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States *O.J. L 158*.
[315] Directive 2004/38/EC cited *supra* note 314 Art. 6.
[316] Directive 2004/38/EC cited *supra* note 314 Art. 7.

citizen, the child of the Union citizen, spouse, or partner or, the dependent parent of the Union citizen, or spouse or partner.[317] "Other family members" may have their entry and residence facilitated by the host State; this is so, if they are family members who were dependent upon the Union citizen or, were members of the same household as the Union citizen, or alternatively, if they need the personal care of the Union citizen due to serious health conditions, or, if they are in a durable relationship with the Union citizen.[318] The third phase of residence envisaged by the Directive, set out in Article 16, is permanent residence in the host state. This is available to the Union citizen and family members (irrespective of nationality) after five years of lawful residence. Article 24 of the Directive affords equal treatment upon Union citizens and their family members. This is an important aspect of the Directive and it applies during the second two phases of residence: longer than three months and, permanent residence. Benefitting from Article 24 means that the Union citizen and their family members are entitled to be treated equally to host state nationals in terms of, for example, access to work, education, housing, and all social and tax benefits. Finally, Articles 27-33 contain procedural protections from exclusion from the host state and, Article 7(3) contains protections for the retention of rights in the event of unemployment or, the death of, or divorce from the Union citizen. Broadly speaking, the Directive has created a coherent logic to the free movement provisions which continues to evolve through the interpretation of the Court of Justice of the EU.

A number of instruments were not absorbed by the Citizens Rights Directive and continue to form part of the free movement *acquis*. Regulation (EC) 883/2004 sets out the coordination of Member State's social security systems in order to facilitate the exercise of free movement rights. This Regulation seeks to ensure that Union citizens and their family members are not disadvantaged in their access to social security as a consequence of exercising free movement rights. It does this through rules that determine the applicable Member State responsible for the social security obligation. The Regulation applies to a number of branches of social security, including those relevant to people with caring responsibilities, such as maternity and equivalent paternity benefits; unemployment benefits and family

[317] Directive 2004/38/EC cited *supra* note 314 Art. 2.
[318] Directive 2004/38/EC cited *supra* note 314 Art. 3.

benefits.[319] The personal scope of the Regulation is wide and it covers nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors. The Regulation does not have an income or economic activity threshold.[320] In principle, the Regulation states that, unless otherwise provided for, persons to whom the Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.[321]

Regulation 492/2011 on the freedom of workers within the Union covers the rights of Union citizen workers working in another Member State as regards equal treatment in matters of employment, remuneration and other conditions of work and employment, as well as certain rights relating to free movement and residence. Specifically, regarding the family dynamic of worker's rights, Article 10 contains the right of the children of a Union citizen worker who is or has been employed in the territory of another Member State to pursue their education, under the same conditions as the nationals of that State, if such children are residing in its territory.[322] The next section explores the privileged status given to "worker" in the rules through examining the hierarchical structure of the rights.

Caring On The Move - Hierarchies of Rights Bearers.

The objective of Directive 2004/38/EC "to simplify and strengthen the right of free movement and residence of all Union citizens"[323] has earnt the instrument the moniker, the "Citizens' Rights Directive". This, along with the reference to free movement being a "fundamental freedom" where the principle of "equal treatment" is enshrined suggests that the rights contained in the free movement provisions have a universal quality.[324] However, Article 7 of the Directive is the

[319] Regulation (EC) No 883/2004 on the coordination of social security systems *O.J. L 166,* Article 3 (EC).

[320] Regulation 883/2004 cited *supra* note 319, Art. 2.

[321] Regulation 883/2004 cited *supra* note 319, Art. 4.

[322] This article has become the subject of ECJ case law and has been interpreted to provide an associated right for the primary carer of the child to reside with them to enable them to pursue such studies, Case C-413/99, *Baumbast*.

[323] Directive 2004/38/EC cited *supra* note 314, Recital 3.

[324] Hervey, op. cit. *supra* note 303 p.92.

centre of gravity for the right of residence and access to the associated social rights that flow therefrom and, central to satisfying Article 7 is being considered a "worker" under EU law. The other categories of beneficiaries in the Directive can enjoy rights and protections but only under certain circumstances: self-employed under Article 7(1)(c) and self-sufficient under Article 7(1)(b) must have health insurance and meet the nationally set income thresholds to be able to support themselves and their family members. "Family members" as defined by the Directive, can enjoy automatic residence and equal treatment when they are accompanying a worker or other Article 7 category of beneficiary, but their rights are derived rights, not free standing and so they are to large extent tethered to the worker's continued employment and residence. Non-economically active Union citizens can enjoy limited residence of up to 3 months on the basis of the Directive but the legal framework concerning residence for a longer period is increasingly ambiguous in its interpretation.[325] Therefore, free movement rights whilst often referred to as "citizens' rights" are not equally available to all but rather are subject to a hierarchy based on economic activity and participation of the labour market, where the most privileged access to rights is for those who meet the criteria of "worker".[326]

Premising rights upon notions of work is extremely significant for women because women and men's relationship with the labour market is not "the same".[327] Women's experience of the labour market is more fluid, it is shaped by her caring responsibilities and is often marked by periods of being out of paid work, out of full-time work and comprised of atypical styles of work. [328] In particular, women

[325] Thym, "The elusive limits of solidarity: Residence rights of and social benefits for economically inactive Union Citizens", (2015) 52 *CMLR*, 17–50, and see discussion of the case law in section 4.3.1 below.
[326] Hervey, op. cit. *supra* note 303 p.92 and; Ziegler "Abuse of Law in the Context of Free Movement of Workers" in *Prohibition of Abuse of Law: A New General Principle of EU Law?* (Oxford, Hart Publishing 2011), pp. 295-314 at p.299: "In order to derive access to a benefit from the principle of non-discrimination under the status of citizen, the refusal of the benefit must amount to a disproportionate restriction of the residence right flowing from Union citizenship (…). It is still much easier to invoke the status of a worker, which automatically entails equal treatment".
[327] Lewis, "Gender and Welfare State Change" (2002) 4(4) *European Societies*, 331–357.
[328] "The Gender Dimension of Geographic Labour Mobility in the European Union" Report cited *supra* note 29, p. 8.

with children under six experience the greatest employment gaps.[329] These gaps are more significant for lone parent households, the vast majority of which are headed by women[330] and who, overall are at a greater risk of living in poverty.[331] Therefore, the ability of the EU law notion of "work" to capture this reality, of the interaction of work and care, is critical to women's equal access to rights and protections. Specifically: Can women's unpaid care work contribute towards her status as a worker? How are women's rights affected when she combines paid work and unpaid care? What are the legal consequences for women's residence and associated rights if she does not qualify as a worker? And, do the rights for family members support women when they have caring responsibilities? The subsequent sections investigate these questions.

Unpaid Care Work and Free Movement Law, being 'Economically Inactive' and the Consequences for Rights.

Women's labour market participation is not perpetual, rather it takes place within the context of the care requirements of her dependents and it is interspersed with absences due to unpaid care.[332] Can, therefore, her unpaid care work contribute towards her status as a "worker" in free movement law? And what are the consequences for her rights and protections if she does not qualify as a "worker"?

Is unpaid care work "work" for the purposes of EU law?

The EU law definition of worker[333] is a matter of "settled"[334] and "well-established"[335] case law. It exists when there is an employment relationship

[329] European Commission, "European Semester Thematic Factsheet Labour Force Participation Of Women" at p. 4, 2015, available at < https://ec.europa.eu/info/sites/info/files/european-semester_thematic-factsheet_labour-force-participation-women_en.pdf> (last visited 24 August 2020).
[330] Ruggeri and Bird, "Single Parents and Employment in Europe. Short Statistical Report No. 3", RAND Corporation, Brussels, 2014.
[331] Misra, Moller and Budig, "Work Family Policies and Poverty for Partnered and Single Women in Europe and North America", 2007, 21 (6) *Gender & Society*, 804–827.
[332] European Semester Thematic Factsheet Labour Force Participation Of Women report cited *supra* note 329, and "The Gender Dimension of Geographic Labour Mobility in the European Union" Report cited *supra* note 29, p. 8.
[333] Case C-75/63, *Hoekstra (nee Unger) v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten*, ECLI:EU:C:1964:19.
[334] Joined Cases C-22/08 & C-23/08, *Vatsouras and Koupatantze*, EU:C:2009:344, para 26.
[335] Case C-14/09, *Genc*, EU:C:2010:57, para 36.

meaning that for a certain period of time a person performs services for and under the direction of another person in return for which they receive remuneration[336] provided that such activities are "genuine and effective" and not on such a small scale as to be "marginal and ancillary".[337] Despite the enduring nature of the definition, it having remained unchanged for decades, it is nevertheless a continually evolving concept. Changes in the labour market including the surge in atypical employment relationships which tend to be more fluid and less regulated, the rise in the reliance on part-time or self-employed work, the enlargement of the EU to include new Member States and the creation of Union citizenship which sensitised Member States to potential increased demands being made of their welfare systems, has meant that the category of worker is continually challenged and clarification from the ECJ sought.[338] Overall, the scope of the term is broad, the Court having taken an expansive view of the kinds of activities that satisfy the definition including part-time work where the income is supported by private means,[339] trainee teachers,[340] and unpaid odd jobs for a person living in a religious community whereby he received bed and board in return.[341] The Court has also upheld the status of worker for students who are workers as well[342] and, has recognised work that is of a rehabilitative nature.[343] However, the Court has consistently confirmed that reproductive labour and associated care-giving are regarded as non-economic activities and that unpaid care work does not qualify as work for the purposes of EU law.[344]

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[336] Case C- 66/85 *Lawrie-Blum v Land Baden-Württemberg*, EU:C:1986:284, paras 16 and 17.
[337] Case *C-53/81 Levin v Staatssecretaris van Justitie*, ECLI:EU:C:1982:105.
[338] See for example Case C-186/87, *Steymann v Staatssecretaris van Justitie*, EU:C:1988:475 and; Case C-294/06, *Payir and Others*, EU:C:2008:36 and; Case C-456/02, *Trojani* v *Centre public d'aide sociale de Bruxelles*, ECLI:EU:C:2004:488.
[339] Case C-53/81, *Levin*.
[340] Case C-66/85, *Lawrie-Blum*.
[341] Case C-196/87, *Steymann*.
[342] Case C-46/12, *LN* v. *Styrelsen for Videregaende Uddannelser og Uddannelsesstotte*, EU:C:2013:97.
[343] Case 344/87, *Bettray* v. *Staatssecretaris van Justitie*, EU:C:1989:226 and; Case C-316/13, *Fenoll*, EU:C:2015:200.
[344] Joined Cases C-48.88, C-106/88 and C-107/88 Case C-44/88, *Achterberg-te Riele and others v Sociale Verzekeringsbank* 1988 *O.J. C 72*; Case C-31/90 *Johnson v Chief Adjudication Officer* ECLI:EU:C:1991:100; Case C-325/09 *Secretary of State for Work and Pensions v Dias,* ECLI:EU:C:2011:498; Case C-77/95, *Züchner v Handelskrankenkasse*, ECLI:EU:C:1996:425 and; Ackers, "Women, citizenship and European Community Law: The gender implications of the free movement provisions", (1994), 16:4, *Journal of Social Welfare and Family Law*, 391-406; Busby, "Crumbs of Comfort: pregnancy and the status of 'Worker' under EU law's Free movement

The EU definition of worker therefore appears to be based on the notion of "public" and "private" work, where only work pursued in the "public" domain is considered "genuine and effective" work.[345] In *Züchner*, the wife of a man who became disabled in an accident, sought the status of worker on account of the unpaid care she provided for him. Whilst the Court accepted the caring needs, it continued that when someone becomes incapacitated that care "must be provided by an outsider in return for remuneration if there is no-one else, whether or not a member of the family, who will do so without payment".[346] The Court would not accept that Mrs Züchner qualified as a worker, reasoning that to do so would "have the effect of infinitely extending the scope of the directive".[347] In *Johnson*, the Court held that "a person who has given up his or her occupational activity in order to attend to the upbringing of his or her children" falls outwith the scope of the Directive. While the UK and the Commission made the point that the Directive placed women at a disadvantage because it is "mainly women who interrupt their occupational activities in order to attend to the upbringing of children"[348] the Court deferred to the Community legislature to remedy the disadvantage.[349] In *Dias*, the Court held that periods of child care between periods of employment should not be considered to be "lawful residence" and therefore should not count towards the accrual of permanent residence. Ms Dias took a period of voluntary unemployment, between periods of employment, where she was looking after her six month old child. The acquisition of permanent residence requires five years of *continuous* lawful residence. The Court found that the period during which Ms Dias was doing full time childcare interrupted the continuity of her residence, they said that to calculate her eligibility for permanent residence, the period of residing and working before the interruption was therefore to be disregarded. To calculate her entitlement to permanent residence she had to begin a new five-year period of

provisions", (2015) 44(1), *ILJ*, 134-145, and O'Brien, "I trade, therefore I am: legal personhood in the European Union", (2013) CMLR, 1643-1684.

[345] Hervey, op. cit. *supra* note 303 p.104.

[346] Case C-77/95, *Züchner*, para 14.

[347] Case C-77/95, *Züchner*, para 14-15.

[348] Case C-31/90 *Johnson*, para 24.

[349] Case C-31/90, *Johnson* paras 19-27.

continuous residence.[350] Despite the evolving definition of work, it remains clear that unpaid care work is not included.

What are the consequences of not having worker status? The refusal to accept unpaid care as work for the purposes of EU law means that those who are not in paid work on account of their caring responsibilities are treated first and foremost as economically inactive Union citizens. Assuming that she does not have the financial resources to be regarded as economically self-sufficient (Art. 7(1)(b)), being economically inactive means that she cannot satisfy the criteria in Article 7 and therefore is not lawfully resident in the host state (beyond the first period of three months).[351] Without lawful residence, the rights and protections included in the Directive are unavailable. The effect of this is extreme. The consequences in the short term are *inter alia* the loss of the right to equal treatment which incurs the loss of social assistance benefits.[352] The consequences for the long term, include, as clarified in *Dias*, the inability to accrue the continuous lawful residence needed to acquire the right of permanent residence.[353]

Establishing a safety net

This interpretation of unpaid care work and the legal consequences of being regarded as economically inactive has a significantly detrimental impact on women.[354] But rights in EU law for economically inactive Union citizens are a lot more ambiguous than would appear from a strict application of the Directive. Early case law following the inclusion of Union citizenship in Article 18 of the Maastricht Treaty (now Art. 20 TFEU) established that Union citizenship was, "destined to be the fundamental status of nationals of Member States", that it is directly effective and as such Union citizens could enjoy equal treatment on the basis of nationality

[350] Case C-325/09, *Dias*.
[351] Although note, the CRD prohibits a host state from removing a Union citizen for economic reasons (such as not being economically active) Directive 2004/38/EC cited *supra* note 314 Article 27(1).
[352] Social assistance refers to state benefits paid to individuals, which help them meet basic needs, and these benefits may therefore be means tested and are not conditional on previous payments or contributions.
[353] Case C-325/09, *Dias*.
[354] Hervey, op. cit. *supra* note 303 p.104; see also Ackers, op. cit. *supra* note 344 and; Ackers "Citizenship, Migration and the Valuation of Care in the European Union' (2004), 30 (2) *Journal of Ethnic and Migration Studies,* 373-396.

whilst in the host member state notwithstanding whether they were economically inactive.[355] For the purposes of accessing social benefits whilst in the host state the Court, carefully and over decades, through case law, developed the "real link" concept whereby Member States are precluded from using blanket rules excluding Union citizens from social assistance and requiring Member States to conduct an individual assessment of the Union citizen's circumstances.[356] In *Martinez Sala* this meant that whilst Martinez Sala was not economically active in the host state, the Court found that, following the advent of Union citizenship, EU law governed the relationship between Member States and EU nationals, including the principle of equal treatment with host state nationals. Ms Martinez Sala, a single mother, could claim child benefit on the same terms as nationals. This development transformed free movement rights for Union citizens providing an economic safety net in the host Member State.

In practice, the ECJ case law has led to a general presumption of lawfulness of residence and equal treatment of all Union citizens based on the citizenship articles of the TFEU.[357] This presumption has combined with an interpretation of Article 7(1)(b) of the CRD whereby economically inactive Union citizens have been able to access some social assistance so long as they do not "become an unreasonable burden upon the social assistance system of the host Member State". This phrase in Article 7(1)(b) has come to mean that the host state should take a proportionate approach to applications for social assistance and conduct an individual assessment of the nature and degree of any potential burden.[358]

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[355] Case C-184/99, *Grzelczyk*; Case C85/96, *María Martínez Sala v Freistaat Bayern*, EU:C:1998:217; Case C-456/02, *Trojani;* Case C-413/99, *Baumbast;* Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm),* ECLI:EU:C:2011:124 and; Nic Shuibhne, "The Resilience of EU Market Citizenship", (2010), 47 *CMLR*, 1597-1628;

[356] Case C85/96, Martinez Sala; Case C-184/99, *Grzelczyk;* Case C-456/02, *Trojani*; Case C-209/03 *Bidar v London Borough of Ealing and Secretary of State for Education and Skills*, ECLI:EU:C:2005:169; Case C-188/89, *Foster and others v British Gas plc*, ECLI:EU:C:1990:313.

[357] TFEU Art. 20 and 21 and Directive 2004/38/EC cited *supra* note 314 Art. 18, prohibits systematic checks on residence. As an exception to this principle of equal treatment, Art. 24, Directive 2004/38, states that the host Member State is not obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Art. 14(4)(b) which prevents the expulsion of Union citizens if the Union citizens entered the territory of the host Member State in order to seek employment.

[358] See further, O'Brien, Civis Capitalist Sum: Class as the new guiding principle of EU Free Movement Rights', (2016) 53(4) *CMLR*, 937–977; Nic Suibhne, "What I Tell You Three Times Is True' Lawful Residence and Equal Treatment after Dano", (2016), 23(6), *Maastricht Journal of European and Comparative Law,* 908-936; Nic Suibhne, "Limits Rising, Duties Ascending: The Changing Legal Shape Of Union Citizenship", (2015), 52, *CMLR*, 889–938; Thym, op. cit. *supra* note 325; Thym,

Regulation 883/2004 on the coordination of social security for mobile Union citizens also provides for some financial protection for Union citizens regardless of whether they are considered to be workers. Social security refers to state benefits paid automatically to an individual when certain circumstances occur, for example retirement, sickness, maternity or, child benefit and can be paid in the host state. The Regulation provides for certain payments to be "exported" from the home Member State and others paid by the host Member State, for the purpose of facilitating free movement. The Regulation does not set economic activity as a requirement for receiving social security benefits in the host state. In principle, the system anticipates that the competent state for social security entitlements will be the Member State in which the Union citizen is employed[359] but where the Union citizen is not employed, Article 11(3)(e) provides that it is the person's state of residence that will be considered to be the competent state.[360] Article 4 of the Regulation also enshrines the principle of equal treatment and states that, "unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof". This is the case for economically inactive Union citizens. In support of this, the Court has made clear in *Dodl and Oberhollenzer* that the Regulation's predecessor (Regulation 1408/71) was not confined to people in employment and that Regulation 883/2004 is to "replace and extend" it.

The motivation behind the extension of equal treatment principle to economically inactive Union citizens has been in part the desire to give meaning and real rights to the status of Union citizenship. It has also been to facilitate and strengthen the free movement system, and it has consistently been based on the fundamental status of Union citizenship.[361] It has not, at least not explicitly, been about progressing gender equality. Yet, for women, it is highly significant. Taking into

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"When Union citizens turn into illegal migrants: the Dano case", (2015), *European Law Review*, 249-266; Verschueren,"Free Movement of EU Citizens, Including for the poor?", (2015), 22(1), *Maastricht Journal of European and Comparative Law*, 10-34.

[359] Regulation 883/2004 cited *supra* note 319, Art. 11(2).

[360] Regulation 883/2004 cited *supra* note 319, Art. 11(3)(e).

[361] Case C-184/99, *Grzelczyk* and Case C-34/09, *Ruiz Zambrano*.

account women's status in the labour market and the inequalities over time of women's low pay, pay gaps, greater risk of unemployment and a-typical work, women are more likely to be economically inactive or need to rely on social welfare as a relative share of income.[362] Social welfare benefits may be crucial during periods out of work due to unpaid caring and, to support women to enter and remain in paid employment.[363] This is the case even more so for mobile Union citizen women because being migrants they are "dislocated" from the care provided in informal family networks meaning that migrant women have a greater reliance on formal care provision met by social welfare.[364] Therefore, Union citizenship, *Martinez Sala* and the "real link" jurisprudence provides an economic safety net forming an important back stop to women falling off a "cliff edge" of rights and protections.[365] However, because this benefit for women is an unintended consequence and is not recognised and rooted in law, there is a risk that should these rights change or be rolled back, there will not be an examination of the potential detrimental impact on women. This risk plays out as the next section demonstrates.

Dismantling the safety net

Finding this balance for the rights of economically inactive Union citizens and Member States welfare systems in the context of the evolving free movement system has come about through a slow and careful although at times haphazard process of interlinking case law. However, free movement and equal treatment for unemployed Union citizens became an increasingly contentious political topic during the second decade of the 21st century (2010s), in part because of the political tensions surrounding Brexit in the UK and the increasing profile of Eurosceptic parties throughout the continent.[366] Free movement, explains Thym, is

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[362] Schwander and Häusermann, "Who is in and Who is Out? A Risk-based Conceptualization of Insiders and Outsiders", 2013, 23 (3) *Journal of European Social Policy*, 248–269; Bennett, "The Impact of Austerity on Women", 2015, *In Defence of Welfare 2*, (Eds) Foster, Brunton, and Deeming, Bristol: Policy Press, 59–61.

[363] "The Gender Dimension of Geographic Labour Mobility in the European Union" Report cited *supra* note 29, p.8-9.

[364]"The Gender Dimension of Geographic Labour Mobility in the European Union" Report cited *supra* note 29, p.85.

[365] O'Brien (2013), op. cit. *supra* at note 344.

[366] Thym, op. cit. *supra* note 325 at 20-21; Nic Suibhne (2015) op. cit. cited *supra* note 358.

providing a "symbolic function" in current public debate, "serv[ing] as a projection sphere for economic, social and political unease about wider globalization processes". Such political dynamics are difficult to navigate and Thym continues that, "actors involved need to respond to the concerns of the population, while also evading the pitfalls of scapegoating inherent in many policy responses to migratory phenomena".[367] It is in this context as well as a desire on the part of Member States to protect their welfare budgets, that there has become a specific focus upon and intense challenge to economically inactive Union citizens' access to host state benefits.

Practical measures taken by some Member States include setting domestic procedures that require residence qualifications to be met before access to social welfare will be considered. In the UK this was referred to as the "right to reside test". This test had to be met as part of an application for the payment of welfare benefits. To determine the "right to reside" under this test the UK had established criteria based on a strict application of Article 7 CRD. Host state nationals automatically met the test and had a "right to reside" by virtue of their nationality. Union citizens who did not satisfy a strict application of the Article 7 criteria in the CRD, primarily economically inactive Union citizens, did not meet the test and were excluded from accessing social welfare benefits. This represents a shift in approach where residence is a prerequisite of equal treatment. The test appeared to disapply the general presumption of equal treatment on the basis of Union citizenship. Furthermore, the test was structured in such as way so as to appear to be directly discriminatory because resident host state nationals will automatically fulfil it.[368] O'Brien expresses the discriminatory quality of the test emphatically, and notes that,

> UK nationals do not "more easily satisfy" the test; they do not "more often than not" satisfy the test – they always and automatically satisfy the test and so are excused from meeting the condition. Only EU nationals must provide

[367] Thym, op. cit. *supra* note 325 at p.21.
[368] Case C-308/14 *European Commission v. United Kingdom of Britain and Northern Ireland*, ECLI:EU:C:2016:436, para. 35.

> evidence of a right to reside. Only EU nationals can be excluded from entitlement due to economic inactivity.[369]

This test and an overall increasing reluctance to show solidarity with economically inactive Union citizens appears to undermine the position developed through the Court's case law but arguably fits within a literal interpretation of the Citizens' Rights Directive. These practices have led to a number of references to the ECJ seeking clarification on the scope of equal treatment for economically inactive Union citizens and the Court appears to be altering the established approach.[370]

The first such case was *Brey*.[371] In this case the host state applied a "right to reside" test before providing social assistance. In its analysis the Court devoted its attention to the question of whether the benefit in question was covered by the Social Security Regulation and so payable by the host state or whether it was social assistance and therefore the Citizens' Rights Directive thresholds could apply to determine eligibility. The Court concluded that the benefit was social assistance and, that, there was "nothing to prevent" the application of a right to reside test to economically inactive Union citizens claiming social benefits,[372] as the host state had discretion and could ultimately refuse the pension supplement. The Court however did not engage with the right to reside test and so, tacitly, established that EU migrants claiming social benefits may be subject to such a domestic test not applied to its own nationals. In doing so, this case begins a dismantling, by the Court, of Union citizenship rights and the principle of equal treatment for economically inactive citizens.

The subsequent case of *Dano* concerned Ms Dano, a Romanian, single mother who was refused job seekers benefits in Germany.[373] She had not worked in Germany nor was she looking for work. The Court concluded that Ms Dano could not invoke the right to equal treatment because she was not covered by the Citizen's Rights Directive. Despite reaffirming the *Grzelczyk* dictum that EU citizenship was the

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[369] O'Brien, 'The ECJ sacrifices EU citizenship in vain: Commission v UK', (2016), 53 CMLR, 209-243 (emphasis in original).
[370] Case C-308/14, *Commission v UK Judgment*, para 21.
[371] Case C-140/12, *Pensionsversicherungsanstalt v Peter Brey,* ECLI:EU:C:2013:565.
[372] Case C-308/14, *Commission v UK Judgment*, para 68.
[373] Case C- 333/13, *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, ECLI:EU:C:2014:2358.

fundamental status of Union citizens, it did not proceed with the approach outlined in *Martinez Sala*. Rather, the Court drew no further from the body of "real-link" jurisprudence or on the Treaty provisions of Union citizenship in Article 21 or, equal treatment in Article 18. The Court instead, apparently abandons the Treaty as primary interpretative source of secondary legislation and, turned to the interaction of Article 7 of the Citizens' Rights Directive and Article 24 Citizens' Rights Directive on equal treatment thereby treating secondary law as the primary interpretative source. As such, in an outwardly circular argument, Ms Dano, not being a worker was presumed, on account of receiving benefits not to have sufficient resources which in turn, prevented her from satisfying the criteria of both Article 7(1)(a) (a worker), or (b) (a self-sufficient person). She was instead presumed to have moved "solely" for the purpose of claiming benefits. In these circumstances the Court, did not include consideration of the need for an individual and proportionate assessment but instead creates uncertainty as to the relevance of the phrase in Article 7(1)(b) "not to become a burden on the social assistance system of the host Member State". The Court, drawing on *Brey*, moved swiftly to conclude that the Member State was not precluded from denying her access to the benefits she sought. Despite this case appearing to be at odds with the Court's earlier case law and approach, *Dano* has not been consigned as a legal anomaly, as the cases of *Alimanovic*,[374] and *Garcia Nieto*[375], that followed shortly after, entrench the approach.

Alimanovic, and *Garcia Nieto* concerned jobseekers.[376] In *Alimanovic* the job-seekers, a mother and daughter had been workers in temporary jobs for less than a year. During periods of unemployment, they received non-contributory subsistence benefits and Ms Alimanovic also received child benefits for her two younger children. However, the German authorities, upon consideration, suspended payment of all benefits on the grounds that Ms Alimanovic and her daughter were not workers and did not retain the status of workers having worked for only eleven months. For such citizens, Article 7(3)(c) states that worker status can be retained for six months – this is the point at which payment of subsistence benefits to Ms

[374] Case C-67/14, *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others*, EU:C:2015:597.
[375] Case C-299/14, *García-Nieto*.
[376] Case C-67/14, *Alimanovic*; Case C-299/14, *García-Nieto*.

Alimanovic was suspended. In *Garcia Nieto*, a mother and daughter were joined in the host state by the father and son. The father's application for social assistance was denied on the basis that he was a jobseeker in the first three months of residence during which time according to Article 24 (2) he was not entitled to equal treatment. In both cases the Court proceeded in exactly the same way as *Dano* on equal treatment for EU citizens: finding that their right not to be discriminated against in a host state is based on Article 24 (1) of the Citizens' Rights Directive, which is conditioned by a right to reside in that state, which is in turn conditioned by Article 7 of the Directive. It left aside any right to equal treatment based in the Treaty. The Court went on to explicitly revoke the principle of proportionality (which had become ambiguous following *Dano*) and stated that jobseekers were not entitled to a case-by-case assessment before social assistance could be refused.[377]

These cases, read together, reframe equal treatment for economically inactive Union citizens. The right is now placed within a tight construction of the Citizens Rights Directive and premised upon labour market activity. The Treaty based right to equal treatment grounded in Union citizenship and subject to proportionality, appears to be lost. When the Court's reasoning is read in isolation, it appears to be legally coherent and to fit within a literal interpretation of the Citizens' Rights Directive. However, when they are read within the overarching context of the Union citizenship and free movement jurisprudence, these cases have created significant uncertainty and ambiguity as they conflict with the approach established in the earlier case law without explicitly setting that case law aside. The Court side-stepped the prior legal approach to Union citizenship and economically inactive Union citizens, including the "real-link" case law and the proportionality principle embedded in Article 7(1)(b). This earlier approach could be itself said to have operated in a grey area, yet it was legally coherent, due to the reasoned, incremental steps taken over decades and built up through

[377] Case C-67/14 *Alimanovic*, para. 59; citing Case C-140/12 *Brey*, para. 64, 69 and 78: "Although the Court has held that Directive 2004/38 requires a Member State to take account of the individual situation of the person concerned before it adopts an expulsion measure or finds that the residence of that person is placing an unreasonable burden on its social assistance system (…) no such individual assessment is necessary in circumstances such as those at issue in the main proceedings". See further Nic Suibhne (2016), op. cit. *supra* note 358 at pp.936 and 920 – 926.

intersecting cases with legal reasoning grounded in the Treaties and legislation.[378] Through *Dano* and the related cases, the Court has stripped its earlier jurisprudence of meaning. [379] Nic Shuibhne exclaims that it "undercuts five decades of understanding equal treatment as a legal principle of autonomous worth".[380] And it has done so without explanation or legal reasoning. Nic Shuibhne continues to argue that in these circumstances,

> …explicit articulation and careful explanation of the constitutional propriety of that decision are owed to Union citizens, not to mention the national authorities that must deal with it– including the national courts. This is especially true when previous case law has been apparently but not openly reversed.[381]

Searching for an explanation, commentators have concluded that the Court has succumbed to the hostile political climate, the pressure from Member States and their desire to protect their welfare systems.[382] Peers describes the judges to have "read the morning papers".[383] Nic Suibhne acknowledges the "fraught context of crisis-ridden welfare politics" but cannot condone "the extent of the distortion of quality of law – of legal methodology and of systemic coherence – that has been practised to reach the case law outcomes".[384] In the case of *Commission v UK* that followed, the apparent corruption of equal treatment for economically inactive citizens goes deeper.

In *Commission v UK,*[385] scrutiny of and clarity concerning the lawfulness of the right to reside test was again sought. Unlike in the previous cases of *Brey, Dano, Alimanovic* and *Garcia Netio,* the benefits in question were not special non-contributory welfare benefits as governed by the CRD but Child Benefit and Child Tax Credit, which are family benefits and are therefore categorically social

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[378] See further, O'Brien (2016), op. cit. *supra* note 358.
[379] O'Brien, op. cit. *supra* note 369 at 209; Nic Suibhne, (2015), op. cit. *supra* note 358.
[380] Nic Suibhne, (2015), op. cit. *supra* note 358 at p.935.
[381] Nic Suibhne, (2015), op. cit. *supra* note 358 at p.935.
[382] Nic Suibhne (2016), op. cit. *supra* note 358; Thym (2015), op. cit. *supra* note 358.
[383] Peers, "Benefit Tourism by EU citizens: the CJEU just says No", (2014), EU Law Analysis available at <http://eulawanalysis.blogspot.com/2014/11/benefit-tourism-by-eu citizenscjeu.html> (last accessed 25 August 2020).
[384] Nic Suibhne, (2015), op. cit. *supra* note 358 at p.936.
[385] Case C-308/14, *Commission v UK*.

security benefits governed by Regulation 883/2004. The Commission, having initiated infringement proceedings against the UK, had two heads of claim that it presented to the Court. First, the Commission asserted that the domestic criteria that required Union citizens to first satisfy the right to reside test before the social security benefits would be paid, conflicted with the system of coordination within Regulation 883/2004. The consequence of which was to find that no state had the competence to pay the social security. Secondly, the Commission argued that the right to reside test was directly discriminatory and contrary to the principle of equal treatment enshrined in Article 4 of Regulation 883/2004 because it only created conditions for EU citizens and not UK nationals.

The Court confirmed that the benefits were social security benefits and that Regulation 883/2004 applied. The Court then referred to *Brey* and extracted from that decision the formulation that there is "nothing to prevent" the application of a right to reside test to economically inactive Union citizens claiming social benefits.[386] However, it did not address the fact that, unlike in this case, the benefits in *Brey* were social assistance benefits, governed by a different piece of legislation (the Citizens' Rights Directive) whereby a certain amount of Member State discretion is permitted. The Court instead promotes this principle, extracted from *Brey*, beyond other primary and secondary law, and specifically, beyond Regulation 883/2004. This is problematic because the principle in *Brey* is not a stand-alone principle, it is related to the benefit being social assistance and the right to reside test protecting the Member State from an "undue burden" upon their welfare systems. There is a divergence here between on one hand, the *Brey* principle that claims that a "right to reside" test can be applied to economically inactive citizens, and on the other hand, the provisions of Regulation 883/2004 stating that within its scope are economically inactive citizens, and that the right of equal treatment is not contingent upon economic activity.[387] The Court proceeds without explaining this divergence.

The Court then turned to the nature of the "right to reside test". However, its assessment was not methodical. Without responding to the question of direct

[386] Case C-308/14, *Commission v UK,* para 68.
[387] Regulation 883/2004 cited *supra* note 319, Art. 2, 4 and 11(3)(e); Case C-543/03 *Christine Dodl and Petra Oberhollenzer v Tiroler Gebietskrankenkasse,* ECLI:EU:C:2005:364.

discrimination and without setting out reasoning, the Court held that the test was indirectly discriminatory. The Court then, did not evaluate the proportionality of the test itself, it did not examine whether the indirect discrimination could be justified, to determine whether the test was lawful. Instead, the Court turned to focus on the proportionality of how, when applying the test, the UK checked the lawfulness of residence. In doing so, the Court made a further surprising move and found that the Commission had not put forward sufficient evidence that showed that the means of checking was not proportionate (to the UK's objective of protecting its public finances). By doing this the Court shifts the burden of proving the proportionality of the measure, from the Member State and places it upon the Commission. This led the Court to find that there had been no discrimination contrary to Article 4 of Regulation 883/2004. By failing to examine whether the test is justified the Court tacitly approves a system which automatically denies a proportionality-based assessment of a Union citizen's eligibility for the benefit. And the Court does this without providing reasoning. Sweepingly, the Court dismisses citizenship-based claims for equal treatment, and it does so without reference to citizenship or the provisions in primary law.[388]

The result in *Commission v UK* may not be unexpected given the outcomes of the social assistance cases that come before it. What is remarkable is that this case concerned social security benefits governed by a different legislative framework; not only has the secondary law supplanted primary law and the interpretation on access to rights narrowed but the approach taken towards the Citizens Rights Directive has now been conflated with Regulation 883/2004. And this move is premised upon legal reasoning that is "careless" and "shaky" and that withholds a full explanation.[389]

The significance of this about turn for women with full time care responsibilities is huge. Prior to *Dano* and the associated cases, the consequences of her not being regarded as a "worker" and regarded as economically inactive were mediated by Union citizenship. Where she could establish a "real link" with the host country she was owed an individual assessment and a proportionate response from the host

[388] For a comprehensive critique of the Court's judgement in this case see O'Brien, op. cit. *supra* note 358 and 369.
[389] O'Brien, op. cit. *supra* note 358 and 369.

state before the lawfulness of her residence and her right to equal treatment could be denied and the Social Security Regulation ensured that basic benefits would be paid regardless of living in another member state.

Summary

In summary, the free movement framework initially fails women by not regarding unpaid care work as "work" for the purposes of Union law. The needs of women who have caring responsibilities were briefly visible in the early cases of *Züchner*, *Johnson* and *Dias*. However, those needs, and the value of unpaid care work was immediately dismissed by the Court. The economic safety net that was later developed based on the Court's interpretation of Union citizenship, supported women who were economically inactive due to their caring responsibilities. However, this was not done in the pursuit of the objective of gender equality, it was not seeking to develop rights that would meet the needs of women in the host state. Nevertheless, it provided women with some protection in the host state. This economic safety net has now been dismantled through sweeping judgements by the Court that have used ambiguous legal reasoning and that have been strongly criticised by commentators for their lack of legal coherence. The consequences for women with caring responsibilities who are unable to work include rights "cliff edges" in the host country.[390] Women experience these shifts in law acutely, however the impact on women has not been visible. The gendered considerations and impacts were not explored during the ascent of citizenship rights starting with *Martinez Sala* and nor were they explored during the descent into the dismantling of the safety net that began with *Dano*. Whilst women with caring responsibilities were, and could reasonably be understood to be, significant beneficiaries of the safety net that was created, their invisibility has meant that their right did not have a secure footing, it has been eroded without considering the gender equality implications. The result is that women who cannot work due to full time caring responsibilities are penalised by the legal framework and prevented from accessing free movement rights and protections. The next section looks at how the legal

[390] O'Brien, op. cit. *supra* note 344.

framework responds when women are combining paid work with caring for their dependents.

Combining Work and Care: Attaining and Retaining Worker Status

The result of combining paid work with caring responsibilities means women's working life is often marked by periods out of full-time work and can take the shape of atypical styles of work.[391] How are women's EU free movement rights affected when she combines paid work with unpaid care? There are two fundamental challenges that women can face in this situation, firstly ensuring that they are considered to be a worker for the purposes of EU law, and secondly, retaining the status of worker when they are absent due to care-based leave.

Attaining worker status

The definition of "worker" in EU law is broad and the formulation suggests that attaining worker status should be straightforward. The EU law definition of work is met when a person is performing services for and under the direction of another person in return for which they receive remuneration, provided that such activities are "genuine and effective" and not on such a small scale as to be "marginal and ancillary".[392] This is thought to be ideal for women who make up a large number of part time and a-typical workers.[393] According to ECJ case law, the definition of "worker" cannot be modified by Member States.[394] However, while the EU law definition appears to be clear in theory, the ECJ has not given detailed guidance on how to determine whether work is "genuine and effective" and not "marginal and ancillary". In practice, Member States have developed various means of making the assessment of what kind of work is marginal and ancillary. How Member States' systems make these distinctions is increasingly important given the rise in atypical working arrangements which could see some kinds of work excluded

[391] European Semester Thematic Factsheet Labour Force Participation Of Women report cited *supra* note 329, and "The Gender Dimension of Geographic Labour Mobility in the European Union" Report cited *supra* note 29, p.8.
[392] Case C-53/81, *Levin*; Case C-66/85, *Lawrie-Blum*.
[393] "The Gender Dimension of Geographic Labour Mobility in the European Union" Report cited *supra* note 29, p.8.
[394] Case C-53/81, *Levin*; Case C-66/85, *Lawrie-Blum*.

from the status of worker. This in turn has an impact on those, predominantly women whose unpaid care is combined with atypical styles of work.

A pan European report, commissioned by the Commission, on the concept of "worker" in EU law revealed the indicators used by Member States.[395] It states that many Member States apply hours or earnings thresholds. In some Member States such thresholds, in practice, have become determinative rather than indicative of the right to worker status. This results in the exclusion of workers with low numbers of working hours or low earnings, despite the EU legal framework providing for a broad recognition of work for EU law purposes. Furthermore, in many cases, the application of thresholds serves to reverse the burden of proof. In other words, should a worker not meet the Member States thresholds and be deemed to be in "marginal and ancillary work" they must provide evidence to reverse the assumption. When workers have zero-hours contracts, on-call contracts, fixed-term contracts or a combination of these, there is no EU guidance on whether an assessment should take a global view of all work carried out or, whether each contract should be viewed separately. The risk, of not taking a global view of such work, is that a worker who in fact works fairly consistently but based on a series of short-term contracts is considered as someone only carrying out "marginal and ancillary work". Overall, such national practices give a preference to regular and consistent hours of work and those workers with more precarious working arrangements face more difficulties in establishing that their work is "genuine and effective".[396] These practices conflict with the assumption that the Union law definition of worker is an inclusive one and that any number of workers whose work falls outwith the definition must be small. In fact, Member States are making assessments on worker status that risk excluding the growing group of a-typical workers and instead are treating these workers as economically inactive.[397]

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[395] O'Brien, Spaventa, De Conink, "Comparative Report 2015 The concept of worker under Art. 45 TFEU and certain non-standard forms of employment", 2016, European Commission, FreSsco, Brussels.

[396] The concept of worker under Art. 45 TFEU and certain non-standard forms of employment Comparative Report cited *supra* note 395.

[397] The concept of worker under Art. 45 TFEU and certain non-standard forms of employment Comparative Report cited *supra* note 395 p.31.

The implications of not meeting the national hours or earnings thresholds effect all Union citizens in low paid precarious work. However, the specific relationship women have with the labour market[398] - the prevalence of women in part-time a-typical work and the iteration between paid work and unpaid care - mean these national practices have the potential to impact women to a greater extent. Empirical research by Shutes and Walker, into the experience of mobile Union citizen women in the UK notes that women are experiencing difficulty in attaining and retaining the status of worker over time.[399] They found that for example, where a Union citizen woman moves to the UK for work and subsequently has children in that host state, caring for her young children affected her ability to return to the labour market in the same way. Furthermore, mobile mothers face the challenge of matching working hours with child care whilst being apart from family support and in the context of often limited child care services.[400] Lone parents, predominantly women, are potentially forced into precarious forms of work to fit around their limited availability on account of their child care needs or alternatively are forced into precarious forms of child care to enable them to work.[401] In the UK the domestic benefits system makes alterations to reflect a lone parent's reduced capacity for paid work, however the national thresholds applied to assess whether work is "marginal and ancillary" does not take a similar account of when someone is a lone parent.[402] The broad and inclusive definition of work in EU law therefore is negated by increasing national practices of setting thresholds to determine certain atypical styles of work to be "marginal or ancillary". This is excluding women, who, in the context of combining work and unpaid care, have fluctuating hours and rates of low pay.

Retention of worker status

Related to the attainment of worker status is women's legal status during absences from the labour market and her ability to retain worker status. Care-based leave is

[398] Lewis, op. cit. *supra* note 327.
[399] Shutes and Walker, "Gender and free movement: EU migrant women's access to residence and social rights in the U.K.", (2018), 44:1, *Journal of Ethnic and Migration Studies*, 137-153 at 145.
[400] Shutes and Walker, op. cit. *supra* note 399.
[401] Shutes and Walker, op. cit. *supra* note 399 at pp.146-147.
[402] O'Brien, op. cit. *supra* note 369 at p.237.

likely to affect most women at least once during their working lives, such as maternity leave following childbirth. Article 7 of the Citizen's Rights Directive does not include unpaid care work as a basis for lawful residence, therefore there is a problem about how to treat periods of unpaid care in between periods of paid work and, there is a risk that the rights and protections of the Directive will be lost during periods out of work due to caring responsibilities.[403]

The Directive provides for certain kinds of temporary periods out of work. According to Article 7(3) it is possible to retain worker status when workers become temporarily and involuntarily absent from the labour market. The circumstances listed in Article 7(3) include absences because of: illness or accident; involuntary unemployment after having been employed for more than one year; involuntary unemployment after completing a fixed-term employment contract of less than a year or; after having become involuntarily unemployed during the first twelve months (in this case worker status can be retained for six months) or; if the Union citizen embarks on vocational training.[404] The effect is that the Union citizen is treated as though they are a worker for the purpose of enjoying the rights and benefits in the Directive. These grounds anticipate basic social and labour market risks and offer some security of status for Union citizens who are no longer working for one of these reasons. However, Article 7(3) doesn't include care-based leave. Most prominently there is no scope in Article 7(3) for the most obvious and essential care related absence of all – pregnancy and maternity. This omission is perhaps the most overt example of the gender-disparate structure of the free movement provisions [405] and, argues O'Brien, amounts to structural sex discrimination.[406]

In *Jessy Saint Prix*, the Court was asked to clarify whether a pregnant woman who temporarily gave up work because of her pregnancy and subsequent child birth, could be considered a worker for the purposes of enjoying the right of residence

[403] Case C-325/09, *Dias*, Case C-31/90, *Johnson* and see discussion in section 4.3.1 above.
[404] Directive 2004/38/EC cited *supra* note 314 Art. 7(3) (a)-(d) check.
[405] Currie, "Pregnancy-related employment breaks, the gender dynamics of free movement law and curtailed citizenship: Jessy Saint Prix", (2016), 53, CMLR, 543–562, at p.555.
[406] O'Brien, op. cit. *supra* note 344 at 1663 and 1667; Currie, op. cit. *supra* note 405 at 546, Busby, op. cit. *supra* note 344 at p.140.

conferred by Article 7 of the Citizens' Rights Directive.[407] The ECJ clarified that the list of circumstances outlined in Article 7(3) of the Citizens' Rights Directive, whereby a worker could retain the status of worker, was not exhaustive. The Court confirmed that "a woman who gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retains the status of 'worker'". The Court, however, added a condition. The woman can retain the status of worker on this basis provided she, "returns to work or finds another job within a reasonable period after the birth of her child." The ECJ explains that the "reasonable period" was to be determined by the national court in line with national law and in accordance with the EU Directive on pregnant workers. The Pregnant Workers Directive provides for a minimum period of 14 weeks leave, at least two weeks of which must come before the birth. This appears to suggest that the "reasonable period" is at a minimum 12 weeks with Member States able to extend this to align with national periods.

The effect of this case is to extend the grounds for retaining worker status listed in Article 7(3) to include absences from the labour market on account of pregnancy and maternity and this is an important extension.[408] However, the Court distinguished this ground from the other grounds in Article 7(3) by adding the qualification that to enjoy retained worker status the woman must return to the labour market within a "reasonable period". This is distinct from the other categories in Article 7(3) which do not impose a time limit on how long worker status can be retained during an absence from the labour market, other than for when a worker has become involuntarily unemployed within a year, whereby they must return within six months or lose worker status.

The consequences of slipping beyond the "reasonable period" of absence on account of not managing to return to the labour market and therefore losing worker status during maternity are significant. In the short-term retaining worker status is critical for access to social assistance, such as, Income Support, as in *Jessy Saint Prix*. It may also have a consequence for women's eligibility for social

[407] Case C-507/12, *Jessy Saint Prix v Secretary of State for Work and Pensions*, ECLI:EU:C:2014:2007
[408] In Case C-544/18 *The Commissioners for Her Majesty's Revenue & Customs v Henrika Dakneviciute*, ECLI:EU:C:2019:761, the Court extended this protection to self-employed women.

security entitlements such as child benefit which in the UK is payable upon the birth of the child and can be critical in terms of supporting women, with childcare costs, back to work. The rules concerning payment of social security to mobile Union citizens are governed by Regulation 883/2004 which does not state that the Union citizen must be a worker (or retain the status of worker). However, the ECJ, in *Commission v UK*[409] (delivered two years after *Jessy Saint Prix*) permitted a policy of denying child tax credits and child benefits to Union citizens in the host state where they did not meet a domestically imposed "right to reside" test. Union citizens who are not considered to be a worker or who have not retained worker status and are instead considered to be economically inactive, would fail this test, and would be denied the payments.[410]

The long-term effect of losing worker status is the disruption to a woman's ability to accrue permanent residence. Article 16 sets out that permanent residence is accrued after five years of continuous legal residence as a worker, family member or self-sufficient person. It allows for a twelve-month period of absence from the host country on account of pregnancy and childbirth. However, this relates to an absence from residing in the host country and is different from an absence from the labour market for which the Court has limited to a "reasonable period". Thereby, the period of residence of women, whose absence from the labour market extends beyond the "reasonable period" will not be considered to be "lawful" in terms of accruing permanent residence.[411] Shutes and Walker, during their empirical research into the experience of mobile EU citizen women, spoke with welfare advisors who explained the difficulty of acquiring permanent residence, for women with caring responsibilities. One welfare advisor stated,

> Women who were excluded from the status of worker, for doing the unpaid work of caring for children, and who were unable to rely on the status of family member of an EU citizen, were placed in precarious circumstances not only with regard to their right to reside and to social protection in the short term. They faced the prospect of disentitlement from permanent residence in

[409] Case C-308/14, *Commission v UK*.
[410] These are discussed in section 4.3.1 above.
[411] Case C-32/95 *Dias*.

> the long term, which depended on five years of 'continuous legal residence' as a worker, family member or self-sufficient person. Their previous work history counts for nothing unless they have got five years of work history, so essentially the clock is reset in terms of their ability to claim permanent residence.[412]

The "reasonable period" argues Busby,

> Seems a restrictive penalty for women who cannot return to work due to the challenge of finding appropriate work that enables the combining of childcare or meeting child care costs, or if she cannot return to work as quickly for reasons related to the health and well-being of herself or the baby, or on account of the challenges presented by a labour market where there is increasing precariousness underpinning women's employment in many sectors.[413]

Notably, in the Opinion of the Advocate General, the *Jessy Saint Prix* case presented for the first time, the aligning of two EU objectives, that of the promotion of the free movement of workers and non-discrimination on the grounds of nationality, and the promotion of gender equality[414] both of which he says "undoubtedly enjoy constitutional status in EU law".[415] Yet regrettably, the Court did not pursue this reasoning from a gender equality perspective, aside from a brief reference to the EU case law that prohibits pregnancy from being considered analogous to illness.[416] It declined to draw on its own vast jurisprudence surrounding sex discrimination, pregnancy and maternity[417] and did not make reference to the gender equality provisions of the Charter of Fundamental Rights.[418] When assessing the particulars of the case, the force of the Court's

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[412] Shutes and Walker, op. cit. supra note 399 at p.149.
[413] Busby, op. cit. *supra* note 344 at p.139.
[414] Peers, "Pregnant workers and EU citizens' free movement rights", (2014), EU Law Analysis, available at <http://eulawanalysis.blogspot.co.uk/2014/06/pregnant-workers-and-eu-citizens free.html> (last accessed 25 August 2020).
[415] Case C-507/12 *Jessy Saint Prix,* Opinion of Advocate General ECLI:EU:C:2013:84, para 2.
[416] Case C-507/12 *Jessy Saint Prix,* para 29.
[417] Busby, op. cit. *supra* note 344 at 141.
[418] Charter of Fundamental Rights, Art. 23 provides 'equality between men and women must be ensured in all areas, including employment, work and pay'.

reasoning comes from the extent to which the woman can still be considered to "belong" to the host Member State's labour market rather than the gender specific circumstances of her absence and the impact losing worker status would have for her, her child and her access to rights. As such the implications of imposing the condition that she return to work within a "reasonable period" is not explored.

Summary

In summary, combining paid work and caring responsibilities can impact upon women's ability to access EU free movement rights and protections. Firstly, her paid work may not qualify as work for the purposes of EU law. The EU definition of worker, as it is defined by the Court, is broad and inclusive. However, Member States administrative practices set national hours or earnings thresholds below which work is "marginal and ancillary". Without worker status (or an alternative status under Art. 7), her residence is not lawful, and she is not entitled to the rights and protections provided in the Directive. Such a system privileges full time, permanent work and penalises those in precarious low paid work, working patterns that women, due to their caring responsibilities, are more likely to engage in. Secondly, women can only retain the status of worker during care-based absences from the labour market, in a narrow set of circumstances. There is no provision in Article 7 for enjoying free movement rights whilst meeting unpaid care requirements, and until the case of *Jessy Saint Prix*, this included when a woman was on maternity leave (unless she was still employed during the leave period). The ability, following *Jessy Saint Prix*, to retain the status of worker during maternity leave is the only means whereby there is any fluidity between labour market participation and unpaid care work, albeit in the very specific context of pregnancy and maternity. This inclusion by the Court is welcome in as far as it goes to rectify what would otherwise appear to be structural sex discrimination in the Directive.[419] However the Court's approach in *Jessy Saint Prix* meant that the opportunity to consider the interrelation between free movement rights and gender equality was passed over.[420] Instead the Court emphasised that the woman could still "belong" to the labour market whilst on maternity leave but required

[419] O'Brien, op. cit. *supra* note 344 at p.1667.
[420] Currie, op. cit. *supra* note 405.

her to return within a "reasonable period". This formulation entrenches an andro-centric notion work, marginalising and devaluing her and her caring responsibilities.

Can the Family Member Status Fulfil? New Rights for Primary Carers?

The Citizen's Rights Directive provides rights for the family members of Union citizen workers (and those with an alternative status under Art. 7 such as being self-employed or economically self-sufficient.) As it has been discussed, establishing autonomous free movement rights whilst engaged in reproductive labour can be difficult under the free movement rules. Unpaid care work is excluded and marginalised by Article 7 of the Directive and it can be complex to attain and retain rights as a worker when combining work and care. It seems that there is an assumption within EU free movement law that the "private" work of unpaid care is bundled into the structure of family members' rights. "Family member" is defined by Article 2(2) of the Citizens' Rights Directive. The category includes the spouse or partner of a Union citizen (who meets Art. 7 criteria) and their dependent children and parents: "dependent relatives in the ascending line", irrespective of nationality. Family members are not required themselves to be economically active, but the Union citizen must be a worker or otherwise meet the criteria of Article 7. The family member can then accompany, join and reside with the Union citizen. It includes, *inter alia*, the right for the family member to be treated equally with host state nationals, and (provided the Union citizen maintains economic activity to satisfy Art. 7) the possibility for the family member to acquire permanent residence after five years of continuous lawful residence.[421] As noted by the Gender Dimension of Geographic Labour Mobility in the European Union report, the family member status, on the face of it, is an "important" means of protecting the status of women who are not in paid employment, post-move,

[421] A second category of family member, 'Other Family Members' is set out in Art. 3(2), these family members do not have an automatic right to accompany and reside with the Union citizen but they may have their residence 'facilitated' by the host state. They are, any other family members, irrespective of their nationality, not falling under the definition in Art. 2(2) who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen and secondly; the partner with whom the Union citizen has a durable relationship, duly attested. The Worker's Regulation 492/2011 also provides rights for family members, specifically in the context of unpaid care, Art. 10.

and are meeting family care needs.[422] But does it take account of unpaid care work in such a way so as to allow for women's full enjoyment of free movement rights whilst she is caring for dependents?

Derived rights and dynamics of dependency

The family member rights are welcome in terms of the important protection they offer family members however, the structure of "family" created by the Directive and the nature of the right attaching to family member status is problematic in a number of ways. Foremost, is that the quality of the right afforded to family members of the Union citizen is not a freestanding, autonomous right, it is a derived right, and it is subject to the Union citizen's right; it flows from the Union citizen. The continued existence of the family member's right is dependent upon the Union citizen. In this sense derived rights are a kind of "parasitic" right.[423] Upon the acquisition of permanent residence, the right becomes an autonomous right. To achieve permanent residence family members must establish that the Union citizen from whom their right derives has been a worker for five years or has otherwise satisfied Article 7 for five years. The derivative structure of the family member right creates a dynamic of dependency between the family member and the Union citizen worker.

The problem with the dynamic of dependence, created by the derivative nature of the family member right, is immediately evident where there is a relationship breakdown. Challenges arise where the couple separate, and the woman (and children) seek to access social assistance because they are required to evidence their former spouse or partner's worker status. This means that the woman must rely both on his legal status and on his cooperation.[424] Alternatively, the dependency can inhibit women from exiting a relationship. In relationships that involve domestic violence, women are faced with relying on an abusive partner for access to rights and to protect her residence status. This places women in circumstances where they need to evidence the worker status of partners with

[422]"The Gender Dimension of Geographic Labour Mobility in the European Union" Report cited *supra* note 29, p.8.
[423] Ackers, (2004), op. cit. *supra* note 354 at p.381.
[424] Shutes and Walker, op. cit. *supra* note 399 at p.147.

whom contact may jeopardise their safety.[425] In contrast to this, women whose partner or spouse is a national of the host state (therefore not a mobile Union citizen worker) do not qualify for family member status under the Directive because their partners are not exercising free movement rights. Such women who are not in paid work due to caring for children, are therefore excluded from both worker status and family member status which prevents them from accessing social assistance thus, reinforcing their dependency upon their partner.[426]

There is a further problem with the structure of the family member right in the Directive. The family member status appears to be framed by a presumption about the composition of families, and this is problematic for alternative forms of families[427] such as lone parent families, which are predominantly headed by women.[428] In such circumstances, for example, if the woman is not working and is looking after her pre-school children, she cannot benefit from a residence right through the Directive.[429] If she is working, she will need to rely on childcare. She cannot invite a family member to do so, such as a grandparent, because the Directive permits only dependent parents ("dependent relatives in the ascending line"), which such a caregiving role defies.

These shortcomings in the quality and structure of the family member status in the Directive does not, therefore, take account of unpaid caring responsibilities in such a way as to allow for the full enjoyment of free movement rights for women. Rather, access to free movement rights and protections for women who have an unpaid caring role within the family, is dependent upon the legal status (and cooperation) of her partner. This status creates rights "cliff edges" which see women tipping "over the edge of the cliff, from full protection to none – on the

[425] Shutes and Walker, op. cit. *supra* note 399 at p.147.
[426] Shutes and Walker, op. cit. *supra* note 399 at p.148.
[427] Hervey, op. cit. *supra* note 303 at p.105.
[428] European Institute for Gender Equality, "Poverty, gender and intersecting inequalities in the EU Review of the implementation of Area A: Women and Poverty of the Beijing Platform for Action", (2016), Luxembourg: Publications Office of the European Union, 2016.
[429] Unless she is economically self-sufficient in terms of Directive 2004/38 Art. 7(1)(b). The case law relating to Art. 7(1)(b) is discussed below.

basis of apparently arbitrary tricks of circumstance".[430] Circumstances that are often controlled not by her but by her Union citizen partner.

Primary carers in EU law

In recent years, the Court has received references from national courts seeking clarity on the status of family members who are primary carers of a Union citizen but whose relationship with the Union citizen is not reflected in the Directive.[431] These cases have put forward the argument that the family member in question is the primary carer of a Union citizen and that the Union citizen requires them to be resident with them to meet their caring needs. Care givers have thus become more visible through these cases and rights for primary carers are beginning to form. The scope of the right for primary carers is still being established but it is possible to discern the trajectory of this new status and to ask how far it supports a care giver's enjoyment of free movement rights and protections.

The status of primary carer in EU law resulted from the Court seeking to ensure the "useful effect"[432] of Union citizenship rights.[433] The Court recognised that if a child has an EU right of residence, for that right to have meaningful effect, it must entail a related residence right for the child's primary carer. This first occurred in *Baumbast*, through the Court's interpretation of Article 12 of the Workers Regulation 1612/68, (now Art. 10, Regulation 492/2011). Article 10 provides for the right of the children of a Union citizen worker who is or has been employed in the territory of another Member State to pursue their education under the same conditions as the nationals of that State, if such children are residing in its territory. Having established the child's right of residence to study in the host state, the Court drew on the citizenship provisions in the Treaty. The Court connected the ability of the child to enjoy their Union citizenship rights with the child's need to have their caring needs met. It held that the child's right would be infringed if her primary carer was not permitted to remain with her in the host

[430] O'Brien, op. cit. *supra* note 344 at p.1643.
[431] Case C-413/99 *Baumbast and R*; Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, ECLI:EU:C:2004:639; Case C-34/09 Ruiz *Zambrano*.
[432] Case C-200/02, *Chen*, para 45.
[433] Case C-34/09 *Ruiz Zambrano*.

state. The Court has clarified that the child's right includes the right to be accompanied by the person who is her primary carer and that that person, irrespective of nationality, has a right of residence for the duration of the child's studies. In the subsequent joined cases of *Ibrahim and Texeria* the Court confirmed that the primary carer was not obliged to satisfy economic self-sufficiency criteria in order to benefit from the derived right under Article 10 of Regulation 492/2011.[434]

The Court applied similar reasoning in *Zhu and Chen*.[435] In this case the child was independently financially self-sufficient, meeting the condition for residence under, what is now, Article 7(1)(b) of the Directive. The Court recognised the role of primary carers for Union citizen children who are exercising free movement rights based on the Citizen's Rights Directive.[436] The Court noted that the Directive allowed parents, "relatives in the ascending line" a derived right of residence only where they were dependent upon the Union citizen. The case exposed a lacuna in the Directive whereby there was no scope for a non-dependent relative in the ascending line. The Court found that for the Union citizen child's right to have a meaningful effect it must allow, for the child's primary carer, a derived right of residence, irrespective of nationality. [437]

Where the Citizens' Rights Directive does not apply, because the circumstances mean that either the Article 7 conditions of economic activity are not met[438] or there has been no cross-border movement (needed to trigger the jurisdiction of the Directive) [439] the Court has maintained that a primary carer may derive a right of residence from the child's citizenship rights in Article 20 TFEU. This was established in *Ruiz Zambrano*. The Court explained that the justification for the

[434] Case C-480/08 *Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department*, ECLI:EU:C:2010:83 and; Case C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department*, ECLI:EU:C:2010:80.
[435] Case C-200/02, *Zhu and Chen.*
[436] Then Council Directive 90/364/EEC of 28 June 1990 on the right of residence O.J. L 180, 13.7.1990.
[437] Case C-200/02, *Zhu and Chen*, para 46.
[438] Case C-86/12, *Adzo Domenyo Alokpa and Others v Ministre du Travail, de l'Emploi et de l'Immigration*, ECLI:EU:C:2013:645.
[439] Case C-34/09 *Ruiz Zambrano*.

right was because a refusal to allow the primary carer of the Union citizen child to continue to reside with them, would prevent the child from fully enjoying her citizenship rights. The Court stated, "Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union".[440]

This evolution of the concept of primary carer as a beneficiary in the free movement provisions appears at the outset to make caregiving more conspicuous in Union law, to fill a lacuna in the legislative framework and, to acknowledge the role of caregivers in Union citizens' lives. In subsequent references, as part of examining what the parameters of the "genuine enjoyment test" are, the Court explores the nature of the caring relationship. This is in order to clarify, under what circumstances the primary carer may derive rights. This has developed within the boundaries of each of the legal bases; on the one hand, within the scope of Article 10 of the Workers Regulation and on the other hand, within the scope of Article 7 of the Citizen's Rights Directive or, the citizenship provisions in Article 20 TFEU directly, each one operating slightly differently.

Under the Workers Regulation, the Court discussed in *Alarpe and Tijani* how the primary carer relationship could be ascertained.[441] The Court confirms that the child reaching majority does not have a bearing on the right; the child's right to pursue their education and the associated right of residence for the primary carer, continues until the child has completed their education, including post-graduate education. The decisive question for the child's primary carer is whether the child needs their presence and care *in fact*. The Advocate General's Opinion had offered criteria that may be considered in order to ascertain whether a child continues to need the presence and care of the primary carer. It noted that the national courts may take into account, *inter alia*: the age of the child, whether the child is residing in the family home, whether the child needs financial support or, whether the child needs emotional support from the parent in order for them to be able to

[440] Case C-34/09 Ruiz *Zambrano* para 42.
[441] Case C-529/11, *Olaitan Ajoke Alarape and Olukayode Azeez Tijani v Secretary of State for the Home Department*, ECLI:EU:C:2013:290.

continue their education.[442] Notably the Court chose not to repeat the Advocate Generals' criteria, although its ruling appears to be consistent with it. The Court held that, a Union citizen who was pursuing post-graduate study, not residing with the primary carer nor receiving financial support from the primary carer did, nevertheless, rely on their presence and care in order to complete their studies and, as such the primary carer could benefit from a derived right of residence to remain in the host country.

The scope of the primary carer relationship when the legal basis is Article 20 TFEU was initially understood to be extremely narrow. In the years immediately following *Ruiz Zambrano* the Court received preliminary references from Member States asking for clarification on when Article 20 would prevent a Member State from denying residence to a primary carer of a Union citizen. At this time the Court did not find that Article 20 would prevent a measure of a Member State that sought the removal of a primary carer because the Court did not find the primary carer relationship to have been established.[443] The initial reluctance to find in favour of a right for primary carers on the basis of Article 20 is most likely to be because of the unusual nature of the right. The right appears to apply where the Union citizen child is a national of the Member State party to the dispute and when there has been no cross-border movement and therefore in what appears to be a wholly internal situation.[444] Furthermore, the *Ruiz Zambrano* case, concerned a Colombian national father and his Belgian national child, and has come to be associated with the politically contentious issue of third country nationals' rights in EU law. Many of the references concern third country national parents, often asylum seekers whose refugee or other immigration status has been denied. They are seeking to regularise their residence based on their children having Union

[442] Case C-529/11, *Alarpe and Tijani,* Opinion of the Advocate General, ECLI:EU:C:2013:9, paras 35 – 37.
[443] *Shirley McCarthy v Secretary of State for the Home Department*, ECLI:EU:C:2011:277; Case C-256/11, *Murat Dereci and Others v Bundesministerium für Inneres*, ECLI:EU:C:2011:734; Case C-40/11 *Yoshikazu Iida v Stadt Ulm*, ECLI:EU:C:2012:691; joined cases C-356/11, *O and S v Maahanmuuttovirasto and Maahanmuuttovirasto v L*, ECLI:EU:C:2012:776.
[444] Lansbergen and Miller, "European citizenship rights in internal situations: An ambiguous revolution?", (2011), 7, *European Constitutional Law Review*, 287-307; Nic Shuibhne, "Seven questions for seven paragraphs", (2011), 36, *European Law Review*, 161-162; Hinarejos, "Citizenship of the EU: Clarifying 'genuine enjoyment of the substance' of citizenship rights", (2012), 71, *Cambridge Law Journal*, 279-282; Azoulai, "'Euro-bonds': The Ruiz Zambrano judgment or the real invention of EU citizenship", (2011), 3, *Perspectives on Federalism*, 31-39.

citizenship. However, after several years of uncertainty as to the scope of the primary carer right in *Ruiz Zambrano*, the Grand Chamber, in *Chavez-Vilchez* provided some clarification.[445] The Court elaborated on the factors that can be considered when seeking to establish a primary carer relationship. Like the Court's approach under the Workers Regulation, the Court focuses on whether *in fact* the child needs the primary carer. The Court also adds a fundamental rights quality to its reasoning. It explained that when determining which parent is the primary carer of a child, and whether there is a relationship of dependency between the child and the parent, the competent authorities must take account of the right to respect for family life, as stated in Article 7 of the Charter of Fundamental Rights of the European Union. This is to be read in conjunction with the obligation to take into consideration the best interests of the child, recognised in Article 24 (2) of the Charter.[446] The Court, then goes on to give an account of the factors to be considered when evaluating the care relationship such as the age of the child and the child's physical and emotional development. The referring Court asked whether the presence of an alternative carer negates the primary carers rights. The Court states that the presence – and willingness – of an alternative carer is a factor in the assessment but not a decisive factor. Rather, the Court considers the quality of the relationship between the child and primary carer, and the potential impact on the child of losing that relationship, to be the primary focus.[447]

The Court's approach to evaluating the primary carer's relationship with the Union citizen under each of the legal bases is similar. It is broad, takes a holistic approach and looks to the caring needs and the care relationship *in fact*. The analysis includes a range of factors such as age, shared residence, economic support and, the availability of another carer but it does not create a hierarchy or any requirements. Attention is on the reality of child's need for the presence and care of their primary carer. The cases that have come before the Court focus on the parent and child dyad, but it is not restricted to mother and infant rather, the Court, takes a broader view of care needs and, accepts that children may need

[445] Case C-133/15, H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others, ECLI:EU:C:2017:354.
[446] See Case C-133/15, *Chaves Vilchez*, para 70.
[447] Case C-133/15, *Chavez- Vilchez*, para 71.

care into young adulthood. Furthermore, the reasoning, when the legal basis is the Treaty as in *Chavez-Vilchez*, is underpinned by the Charter of Fundamental Rights, including the fundamental right to family and, the child's best interests. Overall, these considerations take a holistic approach and are grounded in the reality of the caring relationship. Nevertheless, this narrative of care is potentially limited in two main ways. Firstly, the right appears to privilege the caring relationship between parent and child and other forms of caring relationships are not present in the narrative that is developing. Although, some Advocates General anticipate that other forms of caregiving relationships will be recognised in the future and that these could include grandparents caring for grandchildren, non-blood caring relationships, and caregiver spouses the Court has not given any indication of this.[448] The second limitation is the neglect of the carer herself. Ultimately, it is the free movement rational that underpins the rights of primary carers. Under each of the legal bases the Court is seeking to remove potential obstacles to the right to free movement. This means that driving the Court's interpretation of the free movement provisions is the need to remove obstacles to free movement and to avoid discouraging the Union citizen from moving.[449] In each scenario the presence of the primary carer is justified on the basis that it will ensure that the Union citizen can meaningfully enjoy their Union citizenship rights. The consequences for the primary carer are not part of this formulation or consideration. Primary carer rights are subordinate to those of the Union citizen.

The rights that extend to primary carers are not autonomous rights, they are derived rights and as such they flow from the Union citizen, for whom they care. Under the Citizens Rights Directive family members also derive rights from Union citizens however, the rights that primary carers can rely on differ in quality and scope and depend on the legal basis. In some cases, the scope of the rights is not yet clear.

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[448] Case C-457/12, *S. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v G,* Opinion of the Advocate General, ECLI:EU:C:2013:842; Joined Cases C-356/11 and C-357/11 *O, S v Maahanmuuttovirasto* (C-356/11), and *Maahanmuuttovirasto v L* (C-357/11), Opinion of the Advocate General, ECLI:EU:C:2012:595.

[449] As established in Case C-415/93, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, ECLI:EU:C:1995:463, para 104.

The scope of the primary carer's right, based on Article 10 of the Workers Regulation as established in *Baumbast,* was clarified in the joined cases of *Teixeira and Ibrahim*. The Court confirmed that neither the right of residence nor the right of recourse to social assistance was contingent upon the primary carer being economically active or on any other resource requirement. The Court stated, "the parent who is the primary carer can claim a right of residence in the latter State on the sole basis of Article 12 of Regulation (EEC) No 1612/68" without such a right being conditional on their having sufficient resources and comprehensive sickness insurance cover in that State".[450] For the primary carer, this construction means that they may reside in the host Member State for as long as their child continues in education and needs their presence and care, without the need to also be a worker or otherwise economically self-sufficient.[451] However, this right comes to an abrupt end when the child finishes their education. This is because the primary carers right is a derived right. When the child, the bearer of the original, autonomous right, finishes their education, her right of residence ceases. Because the primary carer's right is derived from the child's right, all of the primary carer's EU-derived rights cease simultaneously.[452] This can be contrasted with the form of derived right of residence that family members are granted by the Citizens Rights Directive which provides for the possibility for the family member to accrue the autonomous right of permanent residence after five years of continuous lawful residence. The derived right of residence based on Art 10 Regulation 492/2011, is not residence that can contribute towards accruing permanent residence status. All rights simply cease, leaving the primary carer with no legal status. The Court explained that this was because the primary carer was not required at the outset to meet an economic threshold for the initial residency, as would be required under Article 7 Citizens Rights Directive. Therefore, her residency was an exception to the approach taken to family members in the Citizen's Rights Directive.[453] This approach discounts the period that the primary carer has lived, integrated and potentially worked in the host state whilst caring for the child (of a Union citizen worker). Her residence does not count towards acquiring permanent

[450] Case C-480/08, *Texeira,* para 59.
[451] Case C-480/08, *Texeira,* para 87.
[452] Case C-529/11, *Alarpe and Tijani*.
[453] Case C-529/11, *Alarpe and Tijani*, Opinion of the Advocate General, at para 74.

residence which would allow her to remain living in the host state when the child finishes studying, or the authorities deem the care needs to have ended.

In the scenario that the Union citizen child meets the economic threshold of Article 7 of the Citizens Rights Directive, the Court has held that Article 7 implies a right of residence of their primary carer. After ambiguity for several years about whether the right was based directly on the Treaty, the Court in *Alokpa and Moudouloue*[454] confirmed that if, as in *Chen*, the Union citizen child satisfied Article 7(1)(b) of the Citizens' Rights Directive by having sufficient financial resources and health insurance, then those same provisions allow a parent who is that minor's primary carer to also reside.[455] The implications of the right being part of the Directive (rather than based solely on Article 20 TFEU) is that the primary carer could, potentially, rely on the rights available to family members in the Directive. However, explicit clarity from the Court is still required on this matter, including for example, whether a primary carer can accrue the right to permanent residence in the same way as family members. However, in support of this possibility, the Court has found that primary carers can benefit from the same standard of protections from removal, as those in the Directive.[456] If primary carers are treated as having rights analogous to the rights that family members have under the Directive the scope of the right for primary carers on this basis is the widest of the three legal bases. But it is the most unlikely legal basis given the requirement that the child be deemed to have sufficient financial resources to satisfy Article 7(1)(b).[457]

If the Citizen's Rights Directive does not apply because the child does not satisfy the economic threshold of Article 7 or alternatively where there has been no cross-

[454] Case C-86/12, *Adzo Domenyo Alokpa and Others v Ministre du Travail, de l'Emploi et de l'Immigration*, ECLI:EU:C:2013:645.
[455] Case C-86/12, *Alokpa,* para 29.
[456] Case C-165/14*, Alfredo Rendón Marín v Administración del Estado,* ECLI:EU:C:2016:675 para 38-67.
[457] See Case C-93/18, *Ermira Bajratari v Secretary of State for the Home Department*, ECLI:EU:C:2019:809. The ECJ confirmed that Art. 7(1)(b) must be interpreted to mean that a Union citizen minor has sufficient resources not to become an unreasonable burden on the social assistance system of the host Member State during his period of residence, despite his resources being derived from income obtained from the unlawful employment of his father, a third-country national without a residence card and work permit.

border movement the Court confirmed in *Ruiz Zambrano*, that Article 20 TFEU may preclude the Member State from denying residence to the primary carer.[458] The material scope of a right of residence for the primary carer on this basis is ambiguous. It is not clear whether it mirrors the family member rights of the Citizen's Rights Directive or not. To date the scope of the right is drawn from the legal basis as defined by the Grand Chamber in *Ruiz Zambrano*. Accordingly, the answer to the questions referred in that case, is that Article 20 TFEU is to be interpreted as meaning that it,

> Precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.[459]

For several years, the Court expressed the view that the nature of the *Ruiz Zambrano* case was special due to the very particular circumstances of the *Ruiz Zambrano* family.[460] The scope of the rights or protections the primary carer might be afforded under EU law is still not clear. For example, would she be entitled to equal treatment in the host state and to social welfare? Would she be able to accrue permanent residence? Do her rights cease when the authorities deem her child to no longer require her presence and care? It would appear to be a logical assumption to extend access to social welfare to primary carer's given that the primary carer would after all, be residing lawfully in the Member State, often the criteria upon which access to public funds is granted. Furthermore, from a policy perspective, in many cases the children implicated will be nationals of the host state and it is often the child's poverty that these benefits seek to guard

[458] Case C-34/09, *Ruiz Zambrano*; Case C-86/12, *Alokpa*.
[459] Case C-34/09, *Ruiz Zambrano*, para 44-45.
[460] Case C-256/11, *Dereci*, para 59-74.

against.[461] However it is not clear how the primary carer status would be treated in the increasingly prevalent domestic "right to reside test" and in a climate of restricting access to social welfare on the basis of EU law.[462] The Court has not yet addressed this or the question of access to social welfare. Without explicit rights from the Court, it is currently subject to Member State practice and domestic legislation on social assistance. For example, in the Netherlands, all third country national parents including *Ruiz Zambrano* primary carers, are entitled, under the Law on Social Assistance or under the Law on Child Benefit, to claim benefits if they have been granted a right of residence.[463] However, in the UK, *Ruiz Zambrano* carers had been explicitly excluded from social assistance by domestic legislation, passed in 2012, regardless of their lawful residence (and regardless of whether they are economically active).[464]

Summary

In summary, family member rights under the Citizens Rights Directive and primary carer rights under Articles 20 and 21 of the TFEU are an "important" basis upon which women with caring responsibilities can enjoy the rights and protections of EU free movement law.[465] As discussed in the previous sections of this chapter, it can be difficult to attain and retain rights as a worker when combining work and care. The Directive's family member rights offer a route to lawful residence for women who either have full-time caring responsibilities, or who have periods out of work due to care duties. However, the structure of the rights does not allow women full enjoyment of free movement rights while she is caring for dependents. Fundamentally, this is because the rights are derived rights, they are not freestanding, autonomous rights. The rights flow from the Union citizen and are subject to the Union citizen's right, creating a dynamic of dependence between

[461] O'Brien, "'Hand-to-mouth' citizenship: decision time for the UK Supreme Court on the substance of Zambrano rights, EU citizenship and equal treatment", (2016), 38(2), *Journal of Social Welfare and Family Law*, 228-245.
[462] See discussion in section 4.3.1 above.
[463] Case C-133/15, *Chavez Vilchez*, para 12.
[464] Social Security (Habitual Residence) (Amendment) Regulations 2012 (SI 2012/2587) and related challenge, (1) *Sanneh v. Secretary of State for Work and Pensions* and; *Scott v. London Borough of Croydon* [2015] EWCA Civ 49.
[465] "The Gender Dimension of Geographic Labour Mobility in the European Union" Report cited *supra* note 29, p.8.

the family member and the Union citizen. Furthermore, the structure of the family member rights in the Directive appears to be based on a narrow conception of family and does not support alternative forms of families.[466] For example, lone parent families, which are predominantly headed by women, women who may need to take periods out of work to care for dependents but who do not have a Union citizen partner from whom she can derive family member status.[467] These drawbacks in the quality of the family member rights, from a woman's perspective mean that her access to free movement rights and protections, in this context, is dependent upon the legal status – and cooperation – of her partner, which in turn creates rights "cliff edges".[468]

The status of "primary carer" which has developed through ECJ case law fills a lacuna in the legal framework that ensures that where a Union citizen child needs the presence and care of her primary carer, her primary carer may reside with her.[469] Whilst care givers may have, as a result of this case law, become marginally more visible in EU free movement law, this right is also structured as a derived right and suffers the same shortcomings as the family member rights under the Directive. Furthermore, the scope of the right is ambiguous and differs depending on the legal basis.

The discussion in this section has demonstrated that the structure, scope and at times ambiguity surrounding family member rights and primary carer rights contribute to a significant precariousness for women. Women become dependent upon their Union citizen family member for her rights and depending upon the legal basis of her rights, for example as a primary carer, she may only have access to a limited scope of rights and protections.

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[466] Hervey, op. cit. *supra* note 303 at p.105.
[467] European Institute for Gender Equality, "Poverty, gender and intersecting inequalities in the EU Review of the implementation of Area A: Women and Poverty of the Beijing Platform for Action", (2016), Luxembourg: Publications Office of the European Union, 2016.
[468] O'Brien, op. cit. *supra* note 344 at p.1643.
[469] Case C-413/99 *Baumbast and R*; Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, ECLI:EU:C:2004:639; Case C-34/09 Ruiz *Zambrano*.

Conclusion

The thematic overview in this chapter has charted the visibility of unpaid care in the legal framework governing EU free movement of persons. This began with the question of whether unpaid care work is "work" for the purposes of EU law, and what rights and protections exist in EU free movement law for those who are economically inactive. The second theme explored how women's EU free movement rights are affected when she combines paid work with unpaid care. It discussed two challenges that women can face in this situation, firstly, their ability to attain worker status when she has part-time or a-typical work because of her caring responsibilities. And, secondly, her ability to retain the status of worker when she is absent due to care-based leave. The final theme explored how the family rights in the Citizens' Rights Directive and, the status of primary carer (as developed through ECJ case law), supports women when they have caring responsibilities. What the discussion has demonstrated is that when analysed from a gender perspective, the structure, interpretation, and implementation of the EU free movement of persons rights mean that when one's circumstances involve caring responsibilities or a combination of unpaid care and economic activity, the quality of her EU law rights and protections diminishes. The fullest set of rights are enjoyed by "workers" and access to rights and protections such as equal treatment, are increasingly premised upon economic activity.[470] The legal framework appears to entrench the structure of the public - private dichotomy where paid work is elevated, and those doing unpaid care work are marginalised, and afforded very little recognition, rights or protections. This embeds the gendered roles, related to unpaid care work, into the legal framework, and perpetuates gender inequality. Confined to the private sphere, the needs arising from the interaction between unpaid care work, gender and access to rights are shielded from scrutiny and are not investigated. They are not visible, having not, as Fraser describes, been "de-naturalised"; they are not publicly debated, and they are not a concern of the EU institutions.[471]

[470] Case C-333/13 *Dano*; Case C-67/14, *Alimanovic* and; Case C-299/14, *García-Nieto,* Case C-140/12 *Brey*.
[471] See Chapter 2 pp 23- 26 discussion of "visibility" and Fraser, op. cit. *supra* note 59.

Without enhanced visibility of the reality of unpaid care work in the context of intra-EU mobility, and engagement with the gender equality implications of the legal framework, it is difficult to foresee change in the future. The Court bears significant responsibility as the institution that has driven this field of law for decades, through the Citizens Rights Directive itself which was a "a genuine codification of case law from the judges in Luxembourg", and the continuing jurisprudence.[472] The questions connected with care are also connected to issues that are hugely politically sensitive, such as equal treatment for economically inactive Union citizens, the protection of Member States' welfare systems, or the EU law rights of third country nationals.[473] These are difficult questions for the Court because they reveal a schism between notions of equality and citizenship on the one hand, and the persistence of the market based ideology at the heart of the EU model, on the other hand, a tension which is compounded by Member State anxieties about sovereignty and the protection of public finances.[474] However, without engaging with the gender implications of the rules, the Court is, perhaps unwittingly, upholding a regressive gender order, and undermining the principle of gender equality as a "constitutional principle" of the EU.[475] That said, the neglect of the gender inequality that is present within the free movement legal discourse extends beyond the Court and progress towards rights that can overcome rather than entrench the gendered roles associated with unpaid care should involve a broad range of engaged actors, including amongst others, stakeholders and the legislative institutions of the EU.[476] The next chapter explores, with third sector stakeholders, the reasons for, *inter alia,* the lack of visibility of gender and unpaid care in the context of EU free movement of persons law.

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[472] Menghi and Quéré, "*Free Movement of Europeans Taking Stock of a Misunderstood Right*", (Studies and Reports Jacques Delors Institute, 2016), p. 12, https://institutdelors.eu/wp-content/uploads/2018/01/freemovement-menghiquere-jdi-nov16.pdf (last visited 16 October 2020).
[473] Thym, op. cit. *supra* note 325.
[474] See further, O'Brien, (2016), op. cit. *supra* note 358; Nic Suibhne, (2016) , op. cit. *supra* note 358; Nic Suibhne, (2015) , op. cit. *supra* note 358; Thym, op. cit. *supra* note 325; Thym, op. cit. *supra* note 358; Verschueren, op. cit. *supra* note 358.
[475] Case C-507/12 *Jessy Saint Prix,* Opinion of Advocate General, para 2.
[476] Fraser, op. cit. *supra* note 59.

Chapter 5 Stakeholder Context

Introduction

The purpose of this thesis is to investigate the visibility of unpaid care in EU law and the extent to which the law is transforming the gendered roles associated with unpaid care or is entrenching gendered stereotypes. The aim is also to explore what scope there is, in the future, for the EU to contribute to progress on the fairer distribution of unpaid care work. Attempting to anticipate how these legal fields will develop in the future, requires considering how and why each of the legal frameworks have developed to date. And it requires further probing as to why progress on gender equality, a constitutional principle of the EU, is more prominent in one legal field over another. This includes asking, what institutional drivers and obstacles exist, that may influence progress on the fairer allocation of unpaid care work, and gender equality in the context of EU law.

This chapter builds on the doctrinal studies, conducted in Chapter 3 on EU Social Policy, and Chapter 4, on EU free movement of persons law, with interviews held with specialists in each field. The interviewees were selected from civil society. They are organisations who have experience of how the legal rules operate, on the ground; hence these organisations can speak to the practical relevance and impact of the legal rules. Furthermore, these organisations are actors in policy formation in their capacity as lobbyists or strategic litigators and, so, can bring insights from their experience of engaging with the EU institutions. The interviews were semi-structured interviews conducted with seven lobby and advice groups based in Brussels and the UK. The interviewees can be grouped into two categories, specialists in gender equality and family rights on the one hand, these interviewees' work largely focuses on EU Social Policy matters and, on the other hand, specialists in EU free movement of persons' law.

The inclusion of interviewees' perspectives to this research achieves several things. Firstly, it tests the findings of the doctrinal analysis in Chapters 3 and 4. Secondly, it addresses the research questions, enriching the analysis and adding specialist context. Thirdly, drawing from case work data of the interviewees, it provides insights on what the impact the rules have, from real, lived experience.

Fourthly, it illuminates the factors that influence or inhibit policy and legal reform and in doing so indicates how each of the legal fields may develop in the future.

The interviews were structured around three broad questions. Firstly, how visible are the issues surrounding the unequal distribution of unpaid care between women and men in policy and legal discourse? Secondly, what impact do the legal rights have on the ground? And specifically, do the legal rights contribute to the transformation of the gendered roles associated with unpaid care work? Thirdly, why, from the perspective of the interviewee, have the legal rights developed the way they have? And, what scope is there in the future, for the EU to contribute to progress on the fairer distribution of unpaid care work? The stories that emerge from each field whilst aligning with the doctrinal findings are very different from one another. This chapter takes each narrative in turn. Beginning with EU Social Policy, it relays the discussions with interviewees concerning the increased visibility of care and the extent to which the legal rights have an impact on the ground and are transformative. It then explores how and why the concept of care came to be on the EU agenda, focusing on how the concept of care itself unified actors, and on the collaboration and strategies of interviewees to promote care to the EU institutions. It also examines the factors that may influence the EU institutions to retain their commitment to care in the future. This is followed by a section on EU free movement of persons' law. It presents discussions with interviewees concerning the limited visibility of care and explores the impact that the rights have on the ground, focusing on significant problem areas encountered by interviewees. It then examines how and why the concept of care is largely absent from the legal and policy discourse and what scope there is in the future for progress in this field. Largely, interviewees from within the same field gave a consistent account. For this reason, the quotes that are presented are the best articulation of points that were often made multiple times by different interviewees. When there was divergence in the accounts of interviewees this is set out as a separate point.

EU Social Policy

The Visibility of Unpaid Care in EU Social Policy

Turning first to EU Social Policy, this section will begin by presenting discussions with interviewees about the visibility of unpaid care in EU Social Policy. It will then turn to explore interviewees' views on the transformative quality of rights in EU Social Policy. Finally, it will present the interviewees' perspectives on the evolution of EU Social Policy and the potential for progress in the future on the fairer allocation of unpaid care work and gender equality in the context of EU Social Policy.

Interviewees were asked about the visibility of unpaid care work in EU Social Policy. Unpaid care work is central to the Commission's 2017 Work Life Balance Initiative and Directive 2019/1158 on Work Life Balance for Parents and Carers. Both the Work Life Balance Initiative and the Work Life Balance Directive present care, as a broad inclusive concept, one that involves both women and men and that occurs throughout the life cycle. When asked about how they perceive the visibility of care in EU Social Policy, interviewees were effusively positive about the increased visibility and spoke of the Work Life Balance Directive as a significant achievement in this regard. They also discussed other examples, beyond the Work Life Balance Initiative and the Work Life Balance Directive, of where care can be seen to be increasingly on the agenda of EU policy makers and the EU institutions. This was particularly through the work of the European Institute for Gender Equality.[477] Overall, interviewees described the interest of the EU institutions in care as welcome, new and exciting and that they were proud of their achievements in lobbying for the Directive.

Interviewees described "*the whole topic of care*" as something that *"has not been very visible at the European level, up to now"*. Women's rights and family rights organisations explained that they have lobbied for decades for the recognition of care. In the case of one interviewee, she described the focus of her organisation to have been care, gender equality and reconciliation of work and family life for seventy years. These organisations said that, in their experience, the interest in

[477] EIGE is an autonomous body of the EU, established to contribute to and strengthen the promotion of gender equality: eige.europa.eu.

care that the Commission displayed, leading up to the publication of the Work Life Balance Initiative in 2017 was, remarkable and "*definitely new*".

The Work Life Balance Initiative led to the adoption of the Work Life Balance Directive. Interviewees describe the Work Life Balance Directive as a big achievement on account of the increased visibility it gives to the issues surrounding care, particularly for addressing men's caring role and covering paternity leave, parental leave and carers leave and for the first time acknowledging caring responsibilities as arising beyond child-care and throughout the life cycle. Interviewees said that they felt optimistic for the first time in a long time and said that the recognition in the Directive, meant that there was real potential in the future for progress on unpaid care and gender equality. They described it as laying the foundations for positive long-term change. This interviewee said,

> *Now there is a Directive, which the 2017 Initiative led to, finally, a Directive. It was hard work I can tell you, very, very hard work. We were pushing and pushing. I mean it is not perfect, and in another context, in another world we would have been pushing for a hell of a lot more, but given the political context in particular, it was really difficult and there had been … nothing on legislation since, the last ten years, so this was really a relief at the end, that it was passed.*
>
> *So, as I say, it was not perfect, but it's a start. And we believe … that it sows the seeds for more long-term real change, particularly cultural, mind-set change. It is very much … geared to men, paternity leave, or second partner leave, parental leave, and the new carers leave, which is really good.*
>
> *It's the first time in European legislation that the actual concept of a carers' leave … that it actually acknowledges that there are caring needs throughout the life cycles. So, from that perspective, although it's not perfect, its ten days per worker, per year and that is not really a carer's leave, but it's a start, it's a start. So, we're very pleased.*

Interviewees talked about other examples of where the visibility of unpaid care work at EU level has been increasing, and was reinforcing this progress, including through the work of EIGE, the European Institute for Gender Equality. EIGE produce an annual Gender Equality Index and in 2018 the theme of the Gender Equality Index was work life balance. Interviewees said that this work has *"really raised the issues around care"*.

The focus of EIGE on work life balance and unpaid care work is also significant because it contributes, procedurally, to the enhanced visibility of the issues at the level of the EU institutions. This interviewee explained,

> *And for example, coming back to EIGE again, they usually prepare studies or a report for the Presidencies and then that report becomes … Council Conclusions under the given presidency. So, they are now in the process of preparing a report for the German presidency which will start in July [2020], on the gender care gap.*
>
> *So, I think that is really interesting because I think again it is going to put the issue of care higher up the agenda and also the life-long care needs and the unpaid, invisible care. And raise the questions of women's contribution to the economy and that it is not counted and it's invisible and that it really, really needs to be tackled and really needs to be addressed. So, I think there are some opportunities, definitely, to look at this, at care.*

The Transformative Quality of Rights in EU Social Policy

The Work Life Balance Initiative and the Work Life Balance Directive represent significant milestones in the visibility of unpaid care work in EU law and policy in the field of Social Policy. Interviewees were asked whether this progress was matched by legal rights. Whilst interviewees said that the Work Life Balance Directive represents a big step forward in creating individual rights, they outlined concerns about the ability of the rights to make significant, concrete change. They described limitations due to the availability for pay during care-based leaves, the accessibility of rights and the absence of maternity rights in the Directive.

This interviewee explains that the transformational quality of the Directive is limited by the way the matter of pay is dealt with. The Directive provides that the

matter of pay during care-based leave is one in which the Member State has discretion. This interviewee said,

> *If the issue of pay is not going to be addressed, it's going to actually defeat its purpose because to really bring around, bring about a societal change and to send very positive messages to men, as well, and to employers, that they can't discriminate against men if they wish to take time off to look after whoever, and that they are entitled to paternity leave, and they are entitled to parental leave et cetera, it would defeat the purpose, it really would, if the issue of pay remains.*
>
> *Because, as you know, women are usually paid less. So, if you are faced with a choice within a couple or a family and, you know you are going to be earning less, you are going to be the one to take it. And it's probably going to be the women. So, it's not going to, actually, bring around, bring about that change, that transformation that we hope and believe that it can, that it has the potential to do.*

The second concern of interviewees was the ability of many workers to access the rights in the first place. This is because, amongst other things, recital 17 of the Work Life Balance Directive describes the beneficiaries of the Directive as workers or people who have an employment contract. This means that atypical workers, those in the gig economy, or the self-employed may not be able to access and benefit from the rights. This interviewee said,

> *The second issue is around access, actually qualifying for the rights. And again, this came up for us, as well, when we were working on the Maternity Leave Directive [Pregnant Workers Directive], that in order to actually be able to benefit from the right you have to have met masses of conditionalities in all different countries. You have had to work for a year, you have had to be a resident, et cetera et cetera. So, there are lots, lots of things … because of the precarious labour market, de-regulation et cetera.*
>
> *It's … very, very hard for young people coming onto the labour market today, it's extremely difficult to get a decent quality job, as in contracts and*

> *everything else. So that could back-fire then, because they won't actually meet the criteria to be able to avail themselves of that right.*

The third concern of interviewees was that the Directive neglects maternity rights and that there was a risk that maternity rights will become *"old fashioned"* to talk about in the context of the new discourse of parental leave and gender balanced caring. As there are significant unresolved issues including the ability to qualify for the existing maternity rights and the "*massive discrimination"* being reported by national equality bodies relating to pregnancy and child-birth, particularly when returning to work after child birth. This interviewee explained,

> *Also, I just want to say about the Maternity Leave Directive [Pregnant Workers Directive], because I think we mustn't forget about that and the danger is that it will be seen to be old fashioned. When in fact there is still masses and masses of discrimination against women, pregnant workers but also returning to work and the whole issue of pay and the issue … like the Work Life Balance, of qualifying.*
>
> *I mean more and more young women, and its usually young women, in the pregnancy kind of child-birth years, they … have precarious working conditions, contracts so … they can't avail of maternity leave…*
>
> *While it might be seen that, that is … one of the risks, that while we move ahead, and … have a whole societal change, that actually basic issues, like maternity, [are neglected]. We mustn't … throw the baby out with the bath water. Because I've seen a few proposals that women and men should have equal maternity leave. No! I mean there is a physicality about giving birth and women have the right to recuperate… Men don't live that experience. So that is the risk. … We need to bring that back onto the table too. But not as part of … an old fashioned or going backwards, but rather saying, we need to complete the picture now, we have parental leave, paternity leave, carers leave, we must now make sure that the maternity leave is also … securely guaranteed as well.*

Despite the concerns that interviewees expressed about the ability of the individual rights in the Work Life Balance Directive to be transformative, they were

nevertheless very enthusiastic about the Directive and its potential. They returned to the sentiment that the adoption of the Directive was a big success, that they were "*very pleased*" with it and that it was "*a very good step forward*".

Understanding the evolution and future of care in EU Social Policy

The sense of success and achievement that the Work Life Balance Directive passed was in contrast to the disappointment and pessimism that had surrounded the failure of the Pregnant Workers Directive four years earlier. Interviewees were asked how EU Social Policy had moved on from this difficult period and how care had come to be on the EU agenda. They were then asked what factors may have influenced the inclusion of the bold proposals on care in the Work Life Balance Initiative and, ultimately the adoption of the Work Life Balance Directive. And finally, they were asked what scope there was in the future for continued progress on the unequal distribution of unpaid care work and whether care would remain on the EU agenda. Interviewees discussed a number of interconnected factors that have contributed to care becoming placed highly on the EU agenda, and of central significance is the concept of care itself which attracted and inspired consensus and support.

A period of stagnation for EU Social Policy and moving on.

Interviewees discussed the period when the Pregnant Workers Directive was blocked in the legislative process from 2008 until its withdrawal in 2015 as a period of "*stagnation*". This section will discuss the interviewees reflections on this period where they describe there to be a sense of frustration that EU Social Policy, and gender equality specifically, was at a stand-still. Interviewees explained that the wider political context and the institutional processes involved in EU Social Policy combined to lower expectations for the future.

Interviewees had had an increasingly bleak outlook on account of the failure of the Pregnant Workers Directive at the Council. One interviewee described a retreat into "*banality and superficiality*" on the issue of gender equality and care on the part of the EU institutions and described a lack of "*real thinking*". They said that it seemed that there were conversations happening between NGOs but that

elsewhere at EU level there was '*nothing dynamic'* and that it seemed, "*very, very stagnant"*.

Another interviewee, reflecting on this period, said that to an extent she worried that there was a feeling that gender equality had been "*done*". They wondered whether the stagnation was because there was an impression that gender equality had been achieved in the good times of the 1990s when, for example, with the backdrop of the UN World Conference on Women in Beijing, the Pregnant Workers Directive and the Parental Leave Directives were passed.

Another interviewee placed the issue of stagnation on EU Social Policy and gender equality in the wider political context, which was to an extent posing existential questions for the EU, including contentious political relations with Turkey, and the UK leaving the EU. And they explained that Brexit was causing some paralysis in EU policy making. They said,

> *I think everybody is very cautious, because I mean you have seen what is going on at the European level, we have Brexit, we have a very difficult situation with Turkey and the immigration deal, and everything that is going on. I mean we are working in our little world of gender equality, but our little world is impacted by the bigger politics whether we like it or not. And then if you have Brexit, there is like a paralysis in the system, like ok, the "what now?".*

This interviewee also explained that the institutional process for EU social policy legislation was itself challenging and could in their view inhibit the progress of some gender equality matters. They explained,

> *Everything that is social in the European Union has to be agreed with the Social Partners, the trade unions and employers, and you have several representing them. Business Europe is the main one for the employers but for the trade unions you have the trade unions of the civil service, trade unions for the small companies and trade unions for the big companies and the blue companies … ooff! And Business Europe for the employers, they don't want. ... Every time you want to adopt an initiative that involves, like, that has a social impact, you need to involve them first, because the Treaty*

> *says that you need to involve the Social Partners, and they need to negotiate and if they don't come to an agreement then the Commission has a right to legislate… So even if the Commission tries to present things it's going to be very difficult because the employers, they lobby the Council really hard, and the Council listens to them. That is why the whole Maternity Directive [Pregnant Workers Directive] was blocked. And it's going to be very difficult to see that something comes out of that, because the employers they don't want anything. Nothing.*

Despite this caution, stagnation and certain amount of pessimism that surrounded the withdrawal of the Pregnant Workers Directive, when the Work Life Balance Initiative was published in April 2017 it made bold proposals on issues related to unpaid care work, the Work Life Balance Directive was adopted and the overall focus on care is perceived as "*a win*". The question is, how, in such a stagnating, difficult context did such a broad concept of care come to be at the heart of the Commission's Work Life Balance agenda?

Interviewees explained that whilst the stalling of the Pregnant Workers Directive represented a period of stagnation for the EU institutions, it became a period for new conversations and collaborations for NGOs. Interviewees said that during the period of inactivity a space opened up where organisations began discussing a way forward should the Pregnant Workers Directive fail and a coalition formed, putting pressure on the Commission. This interviewee explained what happened,

> *The way the whole thing happened is that the Maternity Leave Directive [Pregnant Workers Directive] was under revision and it was blocked, and we did a whole campaign with the Women's European Lobby and COFACE* [COFACE Families Europe, Confederation of Family Organisations in the European Union] *and everyone to convince the Council to unblock negotiations because it was blocked for, I think it was already five years and nothing was happening.*
>
> *So, we didn't convince the Council but, we convinced the Commission to say, "Because it is blocked, if nothing happens in six months then we will withdraw it". So, we didn't unblock the negotiation, which was what we*

> *wanted to do, but ... we convinced the Commission that yes, they withdrew the Directive which was going to happen anyway, and we convinced them to present a proposal in 2017, actually it was the end of 2016, on work life balance, that was wider.*

Interviewees explained that during this period, as NGOs began to lobby for what should be in a wider policy on work life balance, discussions within their coalition were increasingly focusing on care. Furthermore, the issues surrounding care were attracting and unifying groups who otherwise until then had had apparently disparate interests. This interviewee explains how the concept of care began to draw support from across the political spectrum,

> *Certain MEPs are more involved in this, you have Maria Erena who is an MEP, Socialist, Belgian, who was working on maternity leave. Now I am seeing the extreme left group is also much more interested in this topic which is new… I am seeing that this group is a lot more interested which was not the case before.*
>
> *Because, you know, when you talk about gender equality sometimes it is very much associated to the left, like feminists and then it is more like family and stuff which is more like centre right which is stupid because I think gender equality and family, everyone has a family. And we [as an organisation] don't care about the political colour.*
>
> *And gender equality I don't see why it has to be owned by one particular political party. So, you know the whole topic of care was more to the conservative ground but now I am seeing that the extreme left is now interested, and we are seeing more hard-core feminists interested, about the topic of care. You see, the feminist movement was not interested in this topic [care], at all. So, we are now seeing that it is really, unifying, yep, and it is good news, and I am really happy.*

The interviewee continued to discuss the unifying effect that the focus on care was having. They were asked whether they considered this to be a silver lining and a small win in the context of the failure of the Pregnant Workers Directive. They said,

> *Yes, yes, yes. I think that's a very good thing. And you will see in our activity report, it's definitely a win. That is because when you are talking about gender equality, also, because of all these, the divisions between parties sometimes it becomes political which is stupid. And 'care' is less tainted. It's not so political, at least not yet. So that's good news, because unfortunately some people maybe want to do things but if they have a brand or are under the umbrella of certain ideas it's like "Oh no, no this isn't something that we do, this is something that the left do", or "This is something that the rights do" and it's just like, meh! This world and gender equality are so politicised and so entrenched and there is so much ideology which is a pity.*

Influencing progress

As the Pregnant Workers Directive stalled at the Council (2010 – 2015), the consensus among NGOs around the issue of care was building, and it was on the agenda of some MEPs and the Commission. However, following the failure of the Pregnant Workers Directive expectations were low about what would actually be proposed and whether any measures would actually be adopted. These expectations were exceeded, the Work Life Balance Initiative was met positively by the third sector, and the Work Life Balance Directive was successfully adopted. Interviewees were asked how this success could be explained and what factors had influenced or driven this outcome.

The interviewees discussed the different factors that they perceived as contributing to this success and they fall into three broad categories, firstly they relate to the broader political context of the EU at the time, including the rising populism in a number of Member States. Secondly, they relate to an increasing appetite in Brussels for EU social policy and to an extent an appetite for gender balanced caring. Thirdly, interviewees returned to the unifying effect that the concept of care had on groups, in Brussels, with otherwise disparate interests and the remarkable collaboration that occurred.

Interviewees described the first factor as the political context across Europe, one that was *"really changing"* in terms of rising "*populism, nationalism and conservatism"*. Where populist movements were gathering support widely across Member States and "*not just those, you know, countries that we traditionally*

well, we would have said". It was alarming and very worrying and there was a sense that without something at the EU level changing, that the EU was "*feeding"* the rise of this kind of politics. Furthermore, the Brexit process where the UK was negotiating to leave the EU was underway and this was contributing to a sense of uncertainty about the future of the EU and how other Member States would respond. There was a feeling that these pressures could become too much for the EU project to sustain, one interviewee said it was possible to imagine how the EU could "*fall apart"*. And from this, there was, said the interviewee, a resolve that developed; a need to do something and a there was "*a moment to say 'OK, let's bring this project back into the heart of [things] … you know, give Europe a soul'"*.

Related to this resolve to give the EU "*a soul"*, is the second factor that contributed to the success of the initiative, an increased appetite at the institutional level for a renewal of EU Social Policy. The European Pillar on Social Rights was adopted in 2017 and this indicated, said an interviewee, that, "*there was an awareness amongst European policy makers that they really had to do something to reach out to people, basically, and let them know that, actually, Europe does care"*. Whilst EU Social Policy is limited in terms of competence, interviewees understood the EU institutions to be eager to do something, to counter the "*populism, nationalism, conservatism, hate"* and to have *"a response"* to it. So, there was interest in social policy, in something that could become a flagship policy at this time and be part of the European Pillar on Social Rights. More specifically and in relation to care, interviewees explained that there was, to an extent, an appetite for gender balanced care, from men. Interviewees described a "*generational shift"* where young men increasingly want to be involved in care. Where, unlike "*their fathers and their grandfathers, they want to be, they want time off, they want quality lives, they want quality and that quality includes spending it with those they love, around them whether its children, parents, whoever"*.

Thirdly, returning to the unifying concept of care, interviewees spoke about how the concept of care brought together different groups and actors who could all relate to the concept of care, in a remarkable way, including gender equality

groups, family rights groups, Age Platform and those with concerns for long term care, informal carers, service providers and trade unions. This interviewee explained how the focus on care brought together an inclusive coalition,

> *I think care was a uniting force because I think it is so real in everybody's lives. Whether you are coming at it from a families' perspective and you really look at the reality of families, in all their diversity, the issue of care is huge. If you look at it from an ageing perspective, because we had also worked with the Age Platform I mean, we are in an ageing society, and the need for long term care is massive and longevity. You know, those caring needs are going to increase. Informal carers … were completely out of the picture, so … they needed to be brought on board as well. And then service providers. Because of austerity measures they were being cut, they were having to work on a shoe-string, in an area where you are dealing with human beings. Trade Unions were very vocal on this, we were all very, you know, not very happy about the Pregnant Workers Directive being withdrawn either.*
>
> *So, it was a whole combination. I think care was a uniting force. And we could all come to it from a different perspective but understood that it was really a collective need and a collective responsibility.*

The disability movement also formed part of the coalition and the focus on care led to interesting discussions between all those involved which in turn led to a deeper understanding of one another and a deeper sense of unity. This interviewee said,

> *It was interesting as well because the term care, for them, [the disability movement] we had a lot of discussion because it can be seen to be a dependency issue. When in fact what we want is a human rights approach, a rights-based approach. So, we had lots of interesting, very, very interesting discussion with the disability movement... So, all issues around independent living, for example. So, it really, really united us. So, I think care united us. In understanding each other … in where we were coming from.*

This broad, inclusive and unified collation which shared a vision of care was able to work effectively together and was committed to finding compromises. This interviewee explains the collaboration, effort and hard work that went on,

> *We were able to work across sectors as well and really find compromises on things. We didn't always agree with everything, but we found real compromises … We were working with different actors … in our own coalition. Service providers also informal carers, families and trade unions… a lot of different actors … which I think, also, was helpful.*
>
> *And, I think we were really able to link up with the European Parliament and they had two, there were two rapporteurs, because there was the FEMM* [Committee on Women's Rights and Gender Equality] *committee and there was the Employment committee, and really work with them. And they too were from more conservative political parties but we were able to really work with them.*
>
> *So, it really showed that we were able to find compromise across our different sectors. So, it [care] actually enabled us to be able to work together, as well, so it was really good, it was really positive in that respect … And we really, really put the pressure on.*

The coalition was clear about their message, the timing was favourable, and they leveraged the 2019 European Parliamentary elections to push the institutions to commit to a bold agenda,

> *And it was good timing, as well, in so far as it just came before the European elections. So, we really pushed and pushed and said, "Look, you really have to send a positive message to people in Europe that says, 'Look you know Europe does care, it's not just about the single market and about Brexit and all, that it's much more than that' and you really have to send a positive message".*

Looking forward, interviewees were asked about what the future held for their work and for EU policy on care. Interviewees were very pleased with the revitalisation of EU Social Policy, of gender equality and with the focus and

recognition of unpaid care work. And they were broadly satisfied with the result, the Work Life Balance Initiative and the Work Life Balance Directive. Now, interviewees are focusing on bringing even more perspectives to the issue of unpaid care work, including perspectives about investing in the care economy, on independent living, on long term, community based care, and building a feminist economics movement to push for an "*equal earner, equal carer model"* to replace the male bread winner model. And this includes bringing in more, new, actors. This interviewee explained,

> *I think there is still lots of things to work out, you know, rights based…Oh, a whole lot of other issues… For us … it's about investing in the care economy but looking at it from different angles. Looking at it from, say, independent living, a whole lot of long-term care, not just institutional care, community-based care, all different forms. And, also, it is statutory rights and … shifting that male bread winner model. So, to come towards an equal earner, equal carer model… Trying to make the case for a feminist economic model, where care is the core… So that's where we are trying to push everything towards in terms of care… from all the different angles we are kind of pushing this.*

Keeping care on the agenda in the future

What however, were interviewees expectations on whether the institutions would maintain their interest and commitment to EU social policy, gender equality and care? Would there be an opportunity to respond to the matters that they are collaborating on and are pushing for? Furthermore, what could undermine the impact should care be kept on the agenda? And finally, interviewees were asked whether the EU has the potential to show leadership in progressing the more equal distribution of unpaid care work. Interviewees explained that they had reason to be optimistic and saw a number of factors that could be influential in maintaining the visibility of care with the EU institutions, these included the UN Sustainable Develop Goals, the European Pillar of Social Rights and the potential of the new von der Leyen Commission.

The UN Sustainable Development Goals were adopted in 2015 and set targets for 2030. UN SDG 5 relates to gender equality and includes the fairer distribution of

unpaid care work between women and men. The EU has committed to integrating the SDGs into their work and whilst interviewees said that it is still unclear how it will work, they nevertheless see the SDGs as a factor that could influence the institutions to retain a focus on care, describing the SDGs as "*a leverage, certainly. Absolutely'* and '*certainly a way of keeping it on the agenda. Definitely*". They described the SDGs as "*everybody's business*" and as providing a new way of reviewing progress on issues and of working across sectors. There was also optimism due to the time span of the Goals meaning that, "*there's another decade to actually work it out and keep it on the agenda*".

The European Social Pillar is another factor that interviewees felt would be influential in keeping care on the agenda and promoting new ways of thinking about the issue. The Social Pillar has twenty principles one of which is the reconciliation of professional and caring responsibilities and the Work Life Balance Initiative was the first major policy to come from the Social Pillar. Interviewees see potential in the Social Pillar and described it as a "*a consensus, about the framework of social policies*" at EU level and one that goes beyond what is in the Treaties and what is in the Charter of Fundamental Rights. It includes for example principles relating to, a child guarantee, housing, homelessness, and access to services. Whilst there are uncertainties about how the Social Pillar will be translated into "*real, concrete*" outcomes, and an expectation that there may be a preponderance of soft law measures, interviewees nevertheless said that it will prompt the institutions to think about issues in a new way, such as asking questions about how you qualify for rights and that it will "*trigger*" looking at issues from "*different perspectives*".

The third factor that interviewees felt would increase the prospect of care remaining on the agenda of the EU institutions was the appointment of the new President of the Commission, Ursula von der Leyen. Von der Leyen was appointed in 2019 for a term of five years, she is the first woman in the sixty-year history of the Commission to be president and she has appointed women to nearly fifty percent of the Commissioner posts. Interviewees said,

> *It is an interesting time, I think there are many different things that can happen, and I think we feel quite optimistic with this new Commission,*

> *certainly the tone has changed, the style has changed. But we'll see if its … real, in-depth change, but certainly there's a very different style…*
>
> *We may not be on her, necessarily, on her side of the political fence but she has sent out some really positive messages. And I think she is taking gender equality seriously. So, I think that's going to be, really it's going to make all the difference. So, we're quite optimistic and feel there is, oooh, a breath of fresh air, haha! Which was absolutely needed.*

However, in the context of this optimism interviewees were conscious of what could, in the future, undermine success in the social policy field. They explained that the EU's approach to the system, post-financial crash, of economic governance over Member States budgets and deficits, would be critical to the real success of any social policy initiatives. This interviewee explained,

> *I just suppose that one of our key concerns would be to ensure that all this is not going to happen in parallel to the kind of dominant economic governance which is keeping tabs on national budgets and deficits and all that, because that obviously … determines a lot of the rest.*
>
> *So, we just hope that there are not going to be those parallel systems in place, but actually linking and joining the dots and really bringing about real fundamental change. But the potential is there. At this stage. We can talk again in five years' time and see if it actually materialised. But the potential is certainly there, and we feel optimistic about that.*

Overall, the enthusiasm and optimism of interviewees persisted, in a marked contrast to the stagnant pessimistic mood that surrounded the failure of the Pregnant Workers Directive. Interviewees were asked whether EU Social Policy had been rejuvenated and whether the EU had the potential to show leadership in the field of gender equality and care. This interviewee was positive,

> *Yes. We sincerely hope so. As I say the German presidency, [July – December 2020] looking at the gender care gap, for which there will be and should be and will hopefully be Council Conclusions, at the end of the year in EPSCO*

(the Employment, Social Policy, Health and Consumer Affairs Council). So that, again, is really good.

So, we'll see now exactly what they are going to be doing. And how they are going to do it...What angle they are going to be taking. But yes, I think there's lots of creative thinking, maybe not too creative, but a little bit, but the style certainly has changed. And the tone has changed, and the vision has changed a bit as well. So, we'll see, we'll see.

Reflecting on these Discussions

To sum up, interviewees were asked how visible they felt the issues surrounding unpaid care work are in EU law and policy in the field of EU Social Policy. They were asked about the impact of the rights in the field and whether they had the potential to contribute to the transformation of the gendered roles associated with unpaid care work. And finally, interviewees were asked to discuss how the field has evolved, what has influenced progress and what has hindered it, and what scope there is for progress on the fairer allocation of unpaid care work, in the context of EU law, in the future.

Interviewees discussed Directive 2019/1158 on Work Life Balance for Parents and Carers and said that in their view the current rights in force are not truly transformative. The explained that significant issues and persistent obstacles remain. These include the issue of incentivising male uptake of leave opportunities through sufficient pay, barriers in terms of initially qualifying for the rights for those with insecure work, and a failure to progress maternity rights for women. Interviewees related some of these matters to the institutional dynamics and legislative processes involved in EU Social Policy. The Commission has been driving the progress with the support of the European Parliament, but interviewees say that initiatives in this field tend to face obstacles with the Social Partners, specifically the Social Partners representing businesses in Europe, who the Commission consult as part of the legislative process (as required by the Treaty) and who also are effective at lobbying the Council. And proposed measures, they noted, are often, ultimately diluted at the Council.

Despite having frustrations with the institutional processes and concerns about the limitations of the rights, especially the neglect of maternity rights, interviewees spoke of their satisfaction with the increased visibility of the issues surrounding unpaid care work brought by Directive 2019/1158 on Work Life Balance for Parents and Carers. They revealed the efforts that they participated in to build alliances between different actors. They said that the issue of care unified otherwise disparate actors, including third sector organisations who otherwise have different interests, and different politic actors who often appear to have entrenched positions on gender equality but for whom care presented a new and neutral matter. The alliances involved examining care from many different perspectives. The focus became about persuading the Commission to replace the failed Pregnant Workers Directive with a more wide-ranging initiative involving care. What followed in 2017, was the Commission's "Initiative to Support Work-Life Balance for Working Parents and Carers" and then Directive 2019/1158 on Work Life Balance for Parents and Carers.[478] Unpaid care, interviewees said, is now firmly on the EU agenda.

The momentum and collaboration that took place leading up to the Work Life Balance Initiative and the success of the Work Life Balance Directive at the Council has led to a sense of optimism amongst interviewees. They see the issues surrounding unpaid care work and gender equality being revitalised, they consider the Directive as having the potential to contribute to a cultural shift and to changing mindsets on matters surrounding unpaid care work and they discussed reasons to be optimistic about continued engagement with care and EU Social Policy more widely through for example the European Social Pillar. The work that was undertaken to engage with new partners and the effort to increase the visibility of care was remarkable. Interviewees believe this effort contributed to the measures proposed by the Commission.

[478] COM (2017) 252 final, "An initiative to support work-life balance for working parents and carers", 2017 and; Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive, 2010/18/EU, *O.J. L 188, 12.7.2019.*

Free Movement of Persons Law

The Visibility of Unpaid Care in Free Movement of Persons Law

Turning now to EU free movement of persons law, this section will begin by presenting the discussions with interviewees about the visibility of unpaid care in EU free movement of person's law. It will then turn to present the views of the interviewees on the transformative quality of rights in the EU free movement legal framework. Finally, it will set out interviewees' perspectives on the evolution of free movement of persons law, including on whether there is scope in the future for progress on the experience of women with unpaid caring responsibilities, in the context of EU free movement rights.

Interviewees were asked about the visibility of unpaid care work in free movement of persons' law. The doctrinal research into EU free movement of persons in Chapter 4 demonstrated that when analysed from a gender perspective the legal framework appears to entrench the structure of the public and private dichotomy where paid work is elevated, and those doing unpaid care work are marginalised, and afforded very little recognition, rights, or protections. When asked about how they perceive the visibility of care in EU free movement of persons law interviewees responses were strikingly different from those on Social Policy. One interviewee described the matter of unpaid care work and EU free movement of persons law to be "in the shadows".

Interviewees discussed women's relationship with the labour market which is affected by the unequal distribution of unpaid care work, and they related this to the Citizen's Rights Directive where the fullest set of rights and privileges are premised upon attachment to the labour market. They said that in their experience, women faced hurdles in qualifying for and maintaining free movement rights because the legal framework did not take sufficient account of the fact that women, due to caring responsibilities, often have absences from the labour market. This interviewee said that, without recognition of women's unpaid care work, the rules, although they appear to be "*gender neutral*" are "*biased*" against women. They explained,

> *There is a lack of acknowledgement of the way certain people go in and out of the labour market. And because the free movement rights are so premised on people being part of that labour market and continuing to be in contact with the labour market, it fails in most circumstances to acknowledge that people may need to take short periods, not necessarily forever, out of that labour market.*
>
> *And you know, when you look at it, on the face of it, it's all gender neutral, but we all know that the majority of carers whether that is for children, or if it is for people with a disability, illness, elderly relatives, that sort of thing, it's all done mainly by women. And, therefore, it does have that sort of gender bias built in that is not recognised.*

Another interviewee questioned whether the impact on women had been considered at the time of drafting the Directive,

> *I would think a complete lack of, sort of, concern about any of these issues, I would say, really. It doesn't even look as though … it was on the radar when these rules were put into place … Even if you look at the explanatory notes to the Directive there isn't very much within there to show that these issues have been thought through…There's a huge number, fifty percent of the population, you know, fall within this category, there should be some provision for them, that certainly wasn't, that doesn't seem to be the approach taken.*

The interviewee was asked whether they thought that this had changed and whether the interconnection between women, the labour market, care and access to rights was now visible and viewed as relevant to the free movement rules. The interviewee said that it had not changed,

> *As it arises it is considered but it doesn't seem to be something within the, you know, the view of, "this is how we want the rules to operate, and this is how we want them to operate for certain groups of people", it doesn't seem to be at that level at all.*

The Transformative Quality of Rights in EU Free Movement of Persons Law

Without visibility in the legal discourse, the risk is that the unequal distribution of unpaid care work and how this effects women and their access to rights is not understood. Legal rights have the potential to transform gender stereotypes, but they can also entrench them. Interviewees were asked about whether the legal rights contributed positively to the transformation of the unequal distribution of unpaid care work. The interviewees explained that the rules did not and that there were a number of ways the rules operated that were problematic for women with unpaid caring responsibilities. They gave examples of how these problems manifested in their work with migrant EU citizens and their families. The issues that the interviewees raised, and that will be discussed in this section, follow, contextualise and add to the academic reflections from the doctrinal study in Chapter 4, and can be understood to fall into three broad categories. Of most significance, according to the interviewees was, firstly, the position in EU law that unpaid care work is not "work" for the purpose of EU law. They were able to explain the negative consequential impacts of being regarded as economically inactive under EU law. Secondly, interviewees explained that they saw a particular "*gap*" in the provision of rights for those who have pre-school children to look after. Thirdly, interviewees said that problems arose for women because family member rights in the Directive are derived rights rather than autonomous rights. Throughout the discussion interviewees explained how each of these issues manifested most acutely when women were leaving an abusive relationship and that they experienced the rules as compounding the vulnerability of these women and their children.

One interviewee began by reflecting generally on the potential of legal rights to be transformative in terms of gendered roles. However, they go on to say that the free movement rules are not transformative here, instead they entrench the existing biased structure of society whereby women undertake the majority of unpaid caring responsibilities,

> *That is the normal pattern for many women, to be in and out of the labour market. That's just what happens for many women with, like you said, whether it's for child-care, whether it's for care of relatives, spouses,*

> *whatever, that is a normal pattern. And already the system, the way things are set up, informally, is biased. So, to then put that into the legislation as well, surely that is somewhere you could actually do something or try and do something about it, change attitudes as well as actually giving people rights.*

Unpaid care work in EU law and economically inactive EU citizens

Turning to the position in EU law of unpaid care work. One interviewee said that at one time, prompted by a project that their organisation was running on social entitlements under EU law, their advice line received many queries about the problems for migrant EEA national carers who were not regarded as 'workers' in EU law. In response the organisation attempted to challenge this position. They focused specifically on carers in receipt of carers allowance who were providing care for family members,

> *We had a specific project, actually, about social entitlements for EU migrants and under that there were a lot of cases at one time where we were trying to argue [in the UK Tribunals] that carers, under EU law, are workers and should be entitled to benefits. That argument was not, legally, very successful.*[479]

This interviewee went on to explain that they have not had success at changing the EU law position in any context, including where the carers have been vulnerable women with child-care responsibilities,

> *We have never been successful with any case in making that sort of argument, even women who are in the most dire circumstances where they have had to leave the family home, because of domestic abuse, they've got young children to care for and need access to a refuge. Even in those cases we have to say, "Well the only way you can do this is to start exercising your Treaty rights". There isn't any fall back that we can say, "Well actually, you know, until your child is a certain age and in need of your full time care you*

[479] These cases due to taking place at the UK First-tier Tribunal (Immigration and Asylum) were not published.

> *should be entitled to a certain level of protection." There is nothing like that.*

Often the consequence for women in this position, if they cannot work due to their unpaid caring responsibilities is that, under free movement rules, they are regarded as economically inactive. This status has become increasingly complex and increasingly precarious following ECJ case law that has narrowed the scope of protections available to those considered to be economically inactive.[480] Being considered economically inactive can mean that you are not considered to have a right to reside in the host country and therefore cannot enjoy the right to equal treatment to, amongst other things, social assistance often essential for basis subsistence. For women who are caring for dependents this can be a critical issue.

One interviewee explained,

> *I think … you had this right as an EU citizen to certain basic standards, or certain basic expectations, and yes that has been eroded down, and there are now many more hurdles that you need to pass or things that you need to demonstrate.*

Another interviewee places the complexity of the EU rules on this matter within the UK domestic context where there have been ongoing cuts to social benefits and explains the precarious situation women can end up in. They said,

> *The freeze on benefits, the cuts in benefits, have a disproportionate effect on women. Therefore, if you've got those cuts and then you are having women who are not being able to access these benefits due to this complicated interaction between European law and [national] social security law, it is just building and building. And you get into the things like the government being very upset when it gets pointed out some of the activities that this may push some women into, whether its prostitution, whether it is, you know, working under the radar, you know, people doing illegal work.*

[480] Case C-333/13 *Dano*; Case C-67/14, *Alimanovic* and; Case C-299/14, *García-Nieto,* Case C-140/12 *Brey*

The narrowing of protections for EEA migrants who are economically inactive means that there is little or no legal or economic safety net for people who cannot work because of their caring responsibilities. The effect this has on peoples' lives and their ability to support themselves and their families was explained by this interviewee,

> *And I think sometimes, we love to sit and look at the regulations and the case law and stuff and, you know, the legal arguments and stuff, but at the end of the day it's people who are being made homeless, they are destitute, they don't have enough money for heating, it affects the children's education, it affects the well-being of the people affected. That's the reality of it… so, it is frustrating… But it's the people that are suffering in the end. And it is, in these cases, going to be disproportionality women and children.*

These effects were most acutely felt by women who were victims of domestic abuse. This interviewee said,

> *Sometimes we spend a long time arguing about this. And what we have to say are things that don't feel very comfortable to say to somebody who is maybe living in a refuge, who has had really traumatic experiences. Having to say, "Actually you can go through a long appeals process about this or you can go and get a job because it is that easy. And when you're not really ready for it and you should be getting the time to try and sort your life out, sort your head out, sort yourself physically out, maybe, you know. And look after your children and look after the other people you are caring for."*

Attaining and retaining rights during pre-school years of childcare

The second area that interviewees raised as causing significant problems was the lack of rights and protections for those who have pre-school children to care for. Interviewees said that women who could not work due to the childcare of pre-school children fell through a "*gap*". The gap occurs between two sets of ECJ case law. On the one hand, the ECJ in *Jessy Saint Prix*, held that women could retain the status of "worker" and therefore the right to reside in the host state following

child birth "for a reasonable period" which the Member State could define.[481] On the other hand, the ECJ, in *Baumbast*, has held that the primary carer of a child of an EU worker who is in education derives a right of residence.[482] Therefore the gap occurs after the maternity period and before the child goes to school.

One interviewee said that this was a persistent problem that came up and that their organisation had been seeking for some time to take strategic litigation to close this gap. They said,

> *Particularly around carers is the Baumbast, sort of line, of case law, of primary carers of children in education. We have recently been involved in a case where we were trying to, maybe, get it extended a bit to pre-school children as well. Because that is, of course, where you've got a gap between Saint Prix and Baumbast. And that is, again, it is usually going to be women, of course, in that situation.*
>
> *Which particularly when you put it in the context of child care and the cost of child care and particularly in the UK where governments both in Westminster and Holyrood have been trying to put more, or saying they are trying to put more, free child care in place. We know that they have really been struggling with that. That even if the policy is good, the practice is that it often doesn't work out because the childcare is not accessible. It is not in the right places or, the right of access is limited, maybe depending on income or getting certain benefits which may be difficult for migrants.*
>
> *So with that lack of affordable child care, it may be forcing people to take on jobs which they can't really afford to be doing because of the childcare costs and where ideally, again, depending on their circumstances those people may benefit, both them and the children may benefit, from having the choice of spending a bit more time on maternity.*

The interviewee explained once again how victims of domestic violence are particularly vulnerable to falling through this gap. They said,

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[481] Case C-507/12, *Jessy Saint Prix*.
[482] Case C-413/99, *Baumbast*.

I mean this particularly comes up … I've done a fair amount of work with a number of the Women's Aid Organisations around Scotland and this is an area where we have big problems.

Where we've got women falling particularly in these gaps. Where often they may be, say, unmarried, they have been living with a partner, the partner is abusive, they leave them, the child is not yet school age and therefore can't yet use the derivative rights through Baumbast but they may be outside the maternity period, even if they previously did work themselves. Therefore, they've not got Saint Prix rights. And then they are, well, penned up in refuges that they can't pay for. And obviously the Women's Aid Organisations are doing everything they can, sometimes having to fund things out of other resources that they've got because the benefits system is not picking up the bill. And it just seems a ridiculous right, that we've got people who are recognised as victims of crime, as well and they are not receiving this support.

Family member rights and dynamics of dependency

The third matter that interviewees found to be concerning was the impact of the derivative nature of family member rights in the Citizens' Rights Directive. Under Article 7 of the Directive family members can automatically enjoy residence rights. This means that a woman who does not have worker status herself due to full-time care responsibilities can enjoy EU residence rights if she is the family member of an Union citizen worker (or someone who otherwise satisfies Art. 7). However, the right that she enjoys is a derived right, it is derived from her "worker" spouse or partner. This creates a dependency between the couple where access to free movement rights and protections for women, who have an unpaid caring role within the family, is dependent upon the legal status (and cooperation) of her partner. Interviewees said that this dependency can cause a number of problems for women, especially upon the breakdown of the relationship. For example, to evidence her derived right, the woman needs evidence of her spouse or partner's status as a worker. It is most acutely felt by women leaving an abusive relationship. Women in this situation must either rely on the cooperation of their abuser to supply the evidence she requires to establish her right which may be

dangerous or, as an alternative to contacting the abuser, she may request that government authorities use data that they already hold to confirm that the abuser is an EEA worker, which can be problematic and cause long delays. This interviewee explained the problems that they had encountered in the domestic system when attempting to enforce the rights of women in this situation and how the free movement rules expose domestic abuse victims to further vulnerability,

> *It is particularly highlighted in domestic violence cases. Where we have somebody who has been financially dependent on a spouse, who may have been here as a worker and depending on their rights from them, when they go and try and access housing and benefits, when they are escaping that situation, then they are quite often turned down because of the problems of proving that they gain those rights. That they derive those rights through the person they have been a family member of, from the abuser.*
>
> *And we end up in the situation where, well we can actually point to various case law that says, where the benefit authority has access to information, or government departments have access to information, they should use that information in determining somebody's rights. There is a particular case, the* Kerr *case, House of Lords 2004*, [Kerr v Department for Social Development [2004] UKHL 23; [2004] 1 WLR 1372] *which is one that I am constantly quoting which is why I am thinking of it, where basically, it says that that they should do that. But what we have found is that the Department for Work and Pensions, particularly, who we mainly deal with, hide behind the Data Protection Act, and say, "We can't access that information because of the Data Protection Act"…*
>
> *… So what we end up with is the particular situation where somebody has to go through, what we now have is, mandatory reconsideration for benefits first, which can take several months, often longer when it comes to benefits cases. We then have the appeals process and once you get it to the appeals process you can apply to the judge for a direction under the Data Protection Act 2018 requiring them to release the information at which point suddenly they go "Oh, right, we are now going to use this information, that we've had all along, to establish a right".*

> *In the meantime, of course, we have got people who may have been evicted, their children have been without adequate housing, clothing, food, have had to rely on foodbanks. I have had a number of welfare rights workers contact me about these cases, where we've had to take very urgent action, as much as we can, to put real pressure on the DWP. Particularly, sometimes, housing providers, to do something about this because we end up with people who are being made destitute because they are not using the information that they actually, already have and are hiding behind the Data Protection Act.*

Interviewees were asked whether the free movement rights were transformative in terms of contributing to a shift in the gendered roles of caring. The problems that interviewees discussed confirm that the free movement rights do not contribute to a positive transformation. Interviewees described the free movement framework as failing to acknowledge, through rights, women's distinct relationship with the labour market where she often must take breaks due to her caring responsibilities. Furthermore, they describe women as not being able to access rights on account of her full-time caring responsibilities, as falling through "*gaps*" in the legal protections or becoming dependent upon her spouse or partner for her residence rights. Interviewees said that the disadvantages that can occur as a consequence of this include the risk of being exposed to legal, economic and for the most vulnerable women, physical insecurity.

Understanding the Evolution and Future of Care in EU Free Movement of Persons Law

Interviewees were asked what scope there was in the future for the development of EU free movement of persons rights that might more positively contribute to the transformation of the unequal distribution of unpaid care work, prevent women facing a disadvantage and ensure that women were equally able to access free movement rights. Specialists in free movement law talked about the role of the ECJ in progressing the law. However, they focused on the limitations of the ECJ as an institution. Interviewees who were specialists in gender equality were experienced in lobbying the policy making institutions of the EU however, they had not, in their work made the connection between EU free movement of persons and

gender equality. They described the EU NGO and policy making world as operating in "*silos*".

Interviewees said that the evolution of the free movement field has historically, largely been led by the ECJ. They recalled that the Citizens' Rights Directive was broadly a codification of ECJ jurisprudence, and they noted that it is through ECJ case law that the rights continue to develop. This, they explained, has an impact on how the rights develop. The ECJ only considers the matters that are presented in the cases referred by national courts. It does not as an institution, carry out a review and then update the rules from a policy perspective with insight into how the rules are impacting specific groups including women with caring responsibilities. One interviewee said that the field of free movement is continually evolving but that no-one has *"actually looked at the vulnerabilities"* and evaluated what women need within EU law to "*effectively reside as EU citizens in another Member State*".

The interviewee explained that it was important that cases be brought that could raise these issues, *"to push forward and to try and take it further"*. However, they said progress is limited by the *"confines"* within which the Court works. They explained,

> *The Court, … I think, works within its own confines, it doesn't … want to make broad sweeping statements, and I think if it's faced with two potential ways out, it will go for the easier, non-controversial straightforward route … I think that if they can find a way of resolving the case on an easier ground, they will go for that ground without dealing with, you know, "Lets overhaul and put in a full host of protections in place here now we have the opportunity" that's not really what their approach seems to be.*

Furthermore, when there is a case at the ECJ that raises the issue of women's caring responsibilities and the interaction of these with the free movement rules, such as in the *Jessy Saint Prix* case, the interviewee felt that the issue is dealt with on as "*narrow a view as it could be*". One consequence of this, explained the interviewee was that for women, "*it's all a very round-about way";* that there are only *"sort of little things that can patch together to try and help them"*.

Interviewees whose work includes lobbying the EU institutions for policy reform on gender equality matters were asked about whether their work included the gender equality implications of the free movement rules. There was a resounding acknowledgement that connections between gender equality, unpaid care work and intra-EU mobility had not been made and lobbying for policy reform on free movement law did not form part of their work. This short discussion with an interviewee illustrates the gulf between the EU gender equality agenda and free movement of persons law, in the minds of those working on gender equality in Brussels,

> *Interviewee: I never thought about it, the thing is when people do caring you are very much bound to a place no?*
>
> *Researcher: But free movement, the reality of EU free movement now is so many young people are moving, and they are settling and starting families in their host country.*
>
> *Interviewee: Yeh, its true.*
>
> *Researcher: And they are having babies when they are working in another country and so on.*
>
> *Interviewee: Yeh, that was my case.*
>
> *Researcher: Yeh. And when I look at the Commission and their strategic documents on gender they will talk about gender and migration in terms of third country national migration into the EU but not actually intra EU free movement and so far I just haven't found an explanation for this.*
>
> *Interviewee: I have no idea.*
>
> *Researcher: You have no idea.*
>
> *Interviewee: I have no idea. And actually, we never talk about that. I don't know if there is an idea behind it. Or ….. no, no idea.*
>
> *Researcher: No explanation.*

> *Interviewee: I don't know... You see, you know, everything really works very much in silos, and it's like the people working on gender equality they don't always think about, they are not necessarily talking to people working on free movement, working on development, so they don't talk about it.*

Where the women's rights or family rights-based organisations did engage with intra-EU mobility they referred to "*transnational families*". The focus of this initiative is on the challenges families face in the country of origin when a family member moves to another member state for better economic prospects, leaving ageing parents and sometimes young children. To a large extent this thinking remains within the paradigm of "reconciliation of work and family life" because the focus is on how to achieve a work life balance when a family is spread across borders. There is not, within this work, scrutiny of how the free movement rules intersect and have an impact on the family. One interviewee explained that when they, a women's rights organisation, focused or lobbied in areas that were not related to the EU employment policy field it was quite unusual and there is a feeling that other areas are not a "*traditional women's rights place*".

Following a short discussion about the free movement rules and how they impact upon women with caring responsibilities the interviewees began to consider some of the problems. For example, one interviewee remarked that the free movement rules appear not to have taken into account the unequal distribution of unpaid care work, and instead "*equality within the household*" appeared to have been "*assumed*". This led the interviewee to compare the lack of individualisation of rights in the free movement rules with work done by many women's rights organisations on the importance of the individualisation of rights in the social security context. They explained that they felt that the individualisation of rights was a "*women's issue*" and that without it women can become dependent on others: their partner or the state, potentially for all of their lives.

Putting care on the agenda in the future

Interviewees were asked further about the "*silos*" that they described working within. They were asked whether, in the future, their organisation or the EU institutions might scrutinise the free movement rules from a gender equality

perspective including for their impact on women with caring responsibilities. Interviewees said that it was too early to say but they discussed the possibility that there would be a new approach to evaluating the social implications of EU policy in the future, referring to the potential of the UN SDGs and the European Pillar of Social Rights.

One interviewee explained that integrating the Sustainable Development Goals was a positive move particularly as it should lead to people working in a more "*interconnected way*" and may contribute to overcoming the problem of people thinking and operating within "*silos*".

Another interviewee referred to the wide-ranging nature of the European Pillar of Social Rights "*that goes beyond what is in the Treaties and in the Charter and looks at, for example, housing, homelessness and access to services*" and that it will *"trigger"* looking at social issues from "*different perspectives"*. This could include, they said, the free movement rules,

> *I think it will force them to look at issues like how you qualify for these rights and the mobility of workers, free movement. Which I think is an angle that hasn't been looked at enough. Particularly with access to rights. And that's something … where there is EU legislation, like Directives … But I think that's something that really needs to be looked at. So, it will trigger, I think, looking at these issues from a different perspective, as well. In the context of other … more hard-core issues, like free movement.*

Reflecting on these Discussions

To sum up, interviewees were asked how visible they felt the issues surrounding unpaid care work are in EU law and policy in the field of EU free movement of persons. They were asked about the impact of the rights in the field and whether they had the potential to contribute to the transformation of the gendered roles associated with unpaid care work or whether they entrench gender stereotypes. And finally, interviewees were asked to discuss how the field has evolved, what has influenced progress and what has hindered it, and what scope there is for progress on the fairer allocation of unpaid care work, in the context of EU law, in the future.

Interviewees described a lack of visibility of the impact of unpaid care on women, in the free movement legal framework. In practice, they said, the rights are not enjoyed equally between women and men. They said that they found that the gendered roles associated with unpaid care are embedded into the rules and that the rules created obstacles to women's enjoyment of free movement rights when she had caring responsibilities.

These concerns, they said, are not visible in the policy and legal discourse. There is therefore a risk that these issues, concerning the gender bias within the legal framework, are not examined and scrutinised. What is needed for women to '*effectively reside as EU citizens in another Member State'* has not been considered.

As mentioned earlier by an interviewee, in practice, the shortcomings in the rules mean that women may have to go about securing their rights in a '*very round-about away'* and have to use *'sort of little things that can patch together'*. Whilst this may be burdensome, many women will be able to manage their residence in the host state. However, this group of women are privileged. The experience, as relayed by the interviewees, of the most vulnerable women, women who are fleeing domestic violence, show us that the impact of the rules can be serious. Interviewees said that their work often involved very vulnerable women and children, who are experiencing physical and economic insecurity due to domestic abuse and they described how the free movement rules intersect with the women's experience, in different ways. They said that often they saw that rather than providing a safety net for EU citizens, the free movement rules added legal insecurity to the ongoing hardship. This may be through not recognising unpaid care work as work and therefore not granting residence to women who are responsible for the full-time care of their children. It may be through the complex hurdles and limited protection that is offered to economically inactive Union citizens, which neglects the necessity of many women to take breaks from employment due to their caring responsibilities. Or it may be because the family rights in the rules create a dependency between family members whereby a woman fleeing an abusive partner may have no autonomous right of residence and is reliant on evidence from her partner before she can confirm her own and her

children's residence status. The interviewees said that they had experience of the free movement rules exposing vulnerable women to further hardship.

It is difficult to imagine, without increased visibility of the impact that the rules are currently having, that there will be progress in the future. There is an absence of joined up lobbying for policy reform on the matter. The connection between gender, care and intra-EU mobility has not been made by the organisations who typically lobby the EU institutions on gender equality issues. Whilst there is an awareness among some free movement experts, of the impact of the rules upon women, the issue is not widely debated. Importance is placed upon strategic litigation and on improving the implementation of the rules. Wider strategies such as the EU Pillar of Social Rights and the EU integration of the UN SDGs into the EU's work offer some potential for the light to be shone on these areas, however, a coherent strategy to address the gender impact of the free movement rules has not been developed. Unpaid care and gender are "in the shadows" of intra-EU mobility rights.

Conclusion

In summary, the two stories, about EU Social Policy on the one hand and EU free movement of persons on the other hand, are very different. The visibility of the issues surrounding unpaid care work is very different. The transformative potential of the rights in each field is very different. And the anticipation of progress in the future could not be more divergent.

The story that emerges from the interviews with organisations active in the field of EU Social policy, describes increased visibility of the issues surrounding unpaid care work and the unequal distribution between men and women. Interviewees describe care to be at the centre of political debate amongst civil society organisations in a way that is reflective of Fraser's "discursive political" moment where care is politicised through engagement across a range of actors and arenas.[483] They describe coming together with a wide range of stakeholders, institutional and political actors. Furthermore, they describe sharing ideas and perspectives,

[483] See Chapter 2 pp 23- 26 discussion of "visibility" and Fraser, op. cit. *supra* note 59.

compromising, and collaborating, and planning and carrying out a strategy to bring about policy reform on the matter of unpaid care work and gender equality in such a way that appears to emulate Fraser's ideal of a democratic and egalitarian process of interpreting needs.[484] They talk about this effort being a work in progress where persistent obstacles still prevent truly transformative rights[485] but where important progress has been achieved and plans to engage further and wider are ongoing. Interviewees said that they saw reasons to be optimistic about the possibility of transformation in the future.

The story that emerges from interviewees discussing EU free movement of persons does not share the same momentum. Interviewees describe rules that appear to be gender neutral but belie a neglect for women's experience and the impact of unpaid care work on them. The interviewees said that the rules did not contribute to progress for women or the fairer allocation of unpaid care work. They described their experiences of where the rules contributed to deepening the disadvantages experienced by women on account of her caring roles. The worst disadvantages are experienced by the most vulnerable women, those leaving domestic violence, where the rules operate to enhance women's insecurity. These concerns do not appear to be visible in the policy and legal discourse. Unpaid care and the gendered impact it has on women's access to rights remains a private matter, concealed from view and shielded from scrutiny and debate. Care is not the subject of political debate; it has not entered into Fraser's "discursive political" arena where it may be investigated and engaged with by a range of actors including civil society organisations and practitioners.[486] Evolution in the field of free movement law is driven by the ECJ through references from the national courts. There is a risk that on this basis any progress for women will be limited and "*narrow*" and that the relationship between gender, care and intra-EU mobility will continue to be neglected, at least in any coherent, holistic, and pro-active sense. The next and final chapter reflects further on these discussions by bringing them together with the doctrinal findings from the previous chapters.

[484] See Chapter 2 pp 23- 26 discussion of "visibility" and Fraser, op. cit. *supra* note 59.
[485] See Chapter 2 pp 26 – 31 discussion of "transformative rights" and Fraser, op. cit. *supra* note 37.
[486] See Chapter 2 pp 23- 26 discussion of "visibility" and Fraser, op. cit. *supra* note 59.

Chapter 6 Conclusion

Introduction

This chapter will make concluding remarks by bringing together and reflecting on the findings of the previous chapters. It will consider the significance of this research and the contribution that it makes, and it will reflect on future research.

EU Social Policy - the Work Life Balance agenda

Gender equality and unpaid care have featured in EU policy making for decades.[487] Through a combination of soft law measures and individual rights in the field of EU Social Policy the EU has had a positive influence on the progression towards alleviating the gendered impact of the unequal distribution of unpaid care work.[488] However, despite the prominence of the work-life balance agenda within the broader field of EU Social Policy, progress has not been consistent or coherent. There have been setbacks and failures, periods of stagnation where policy and legislative development has stalled and an increasing reliance on soft law measures over a rights based legal framework.[489] Challenges to progress can partly be explained by the absence of a clear legal basis for EU action on the matter; work-life balance is not a core concern of the EU and strategies seeking to advance gender equality have often become subsumed by the pursuit of economic growth. The political climate has also at times been hostile to supranational consolidation of social policy. Recently and for over a decade the EU has faced a number of existential crises that have tested the political cohesion of the Member States including the 2008 final crash, the on-going migration crisis, the UK vote to leave the EU in 2016 and the rise of populist anti-EU movements in Member States. At the time, these intersecting factors led commentators to express concern that work-life measures will be "pushed back to Member States for the foreseeable future" and that the high point in innovation and leadership in Social Policy at the EU level was behind us.[490]

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[487] See discussion in Chapter 3.
[488] Busby and James, op. cit. cited *supra* note 136.
[489] See discussion in Chapter 3.
[490] Busby and James, op. cit. cited *supra* note 136.
at p.306.

Demographically, the EIGE Gender Index 2019 states that "the EU continues its snail's pace when it comes to gender equality progress" and, "the unequal sharing of cleaning, cooking and caring responsibilities has hardly changed. The bulk of this unpaid work continues to fall on women".[491] The consequence of this for women noted by the EIGE Director Virginija Langbakk, is that it "makes it harder for [women] to juggle work and personal life, which impacts on their earning potential and the well-being of the women themselves and the people closest to them".[492]

Against this background, the EU has revisited and renewed its commitment to respond to the issues of gender equality, unpaid care and work life balance. The Commission presented the Work Life Balance Initiative - a package of corresponding legal and policy measures in 2017 and the Work Life Balance Directive 2019/1158 which was adopted by the Council in 2019. This moment has been heralded as a "New Start"[493] prompting the EIGE to say that "work-life balance is no longer just a personal goal, it is also a political one".[494]

The aim of this thesis was to advance the scholarship relating to gender, care and EU law by, firstly, analysing the evolution of the work-life balance agenda and updating it with an evaluation of the latest developments (Chapter 3). It did so from a socio-legal perspective, scrutinizing the legal developments as well as going behind the law books to ask how these developments came to be and furthermore to ask what can be understood about how the field has evolved in order to help us anticipate how the law may develop in the future.

This thesis found the EU's renewed commitment to work-life balance to be a significant and positive development in the amplification of the issues surrounding unpaid care. Following the publication of the "New Start Roadmap" in 2015, the Commission held consultations with the Social Partners and with the public. The Work Life Balance Initiative that followed took a distinctly different approach from

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[491] Virginija Langbakk, Director, European Institute for Gender Equality, EIGE, "*Gender Equality Index 2019 Work-life balance",* cited *supra* note 1, p.3.
[492] Virginija Langbakk, Director, European Institute for Gender Equality, EIGE, "*Gender Equality Index 2019 Work-life balance",* cited *supra* note 1, p.3.
[493] European Commission, "New start to address the challenges of work-life balance faced by working families" cited *supra* note 249.
[494] EIGE, "*Gender Equality Index 2019 Work-life balance",* cited *supra* note 1, p.67.

the Roadmap. The Roadmap had focused on the economic imperative of supporting women into the labour market. In contrast, the Work Life Balance Initiative locates the proposed work-life balance measures squarely within the objective of gender equality.[495] At the heart of the Work Life Balance Initiative is a broad, inclusive concept of care. The Commission has reconceptualised the notion of care from the view that care is mainly associated with mothers and infants to a view that care is an integral part of life for both women and men. This wider notion of care considers both parents to be responsible for childcare, it captures the care needs of other dependent relatives and it includes the increasing care responsibilities associated with the ageing demographic. [496] In the Work Life Balance Initiative, the Commission sets out an overarching strategy where priority areas for action are identified. The priority areas are: "improving the design and gender-balanced take-up of family related leaves and flexible working arrangements", "improving the quality, affordability and access to childcare and long-term care" and, "addressing economic disincentives for parents and carers to work".[497] Within these areas for action they propose a Directive that would build upon existing rights to improve the work-life balance of parents and carers. The non-legislative actions include: improved monitoring of the transposition of the legislative measures, improved data collection, capacity building activities, information and awareness-raising campaigns, best practice sharing and, the provision of new funding and support to ensure that existing EU funds are used to support work-life balance measures.[498] Through the Work Life Balance Initiative the Commission raises the issues associated with combining unpaid care with paid work and the challenge of meeting society's growing care needs as a political concern. It then proceeds to place gender equality at the heart of the solution to these challenges. What is proposed is a coherent strategy of interlinking fields of action with a corresponding framework of legislative and non-legislative measures that seeks to

[495] Art. 153 (1)(i) TFEU.
[496] COM(2017) 252 final, cited *supra* note 152, p 4-5. See also Caracciolo di Torella, "An emerging right to care in the EU: a 'New Start to Support Work-Life Balance for Parents and Carers'", 18 ERA Forum (2017), 187–198.
[497] COM(2017) 252 final, cited *supra* note 152, pp. 8-15.
[498] COM(2017) 252 final, cited *supra* note 152, pp. 8-15.

overcome gender inequality and the gendered roles associated with unpaid care, giving men a central role.

The Work Life Balance Directive 2019/1158 was adopted by the Council in 2019. The success of the Directive is remarkable given that its predecessor, the Pregnant Workers Directive, had stalled at the Council before being withdrawn.[499] But it is not simply its successful adoption that is an achievement. The Work Life Balance Directive is a success because of the rights that it contains; it sets out a clear structure of individual rights that support the equal take up of leaves and the sharing of caring responsibilities. It lays down minimum standards for paternity leave, parental leave, carers leave and for flexible working arrangements and it is the first time that paternity leave and carers' leave have been enshrined in EU law. However, the Directive is undermined by its neglect of maternity rights and by the failure to ensure the affordability of care-based leaves because without more robust means of motivating fathers to take up the leave options through adequate pay, the individual rights in the Directive fall short of being able to transform the gendered patterns of paid work and unpaid care. Instead, to appreciate the value of the Work Life Balance Directive, it needs to be seen in the wider context of the Work Life Balance Initiative. The Work Life Balance Directive is part of a new overarching framework which represents a renewal of the reconciliation agenda and offers a conspicuous break from the inclination to tether reconciliation matters to economic objectives, and which has the potential for continued progress in the future.

The empirical research conducted as part of this thesis sought to test these claims with stakeholders (Chapter 5) and interviews with specialists in women's rights and family rights who *inter alia,* lobby for EU policy and legal reform in Brussels. The empirical research confirmed the doctrinal findings. When reflecting upon the Directive one interviewee discussed the significance of the Directive being adopted in the context of the difficult political climate and the relief that they felt when it passed. They conceded that the political context and the historical failure of the Pregnant Workers Directive, amongst other things, had lowered their expectations but that nevertheless they were relieved and pleased that the Work Life Balance

[499] Withdrawal of Commission Proposals, 2015, O.J. (2015/C 257/10).

Directive had passed. They went on to say that despite limitations in terms of the content of the rights they felt that the Work Life Balance Directive was very positive. They explained that it had the potential to have a positive, long-term, impact through contributing to cultural mindset change, partly because of the distinct emphasis that it places on men's role in sharing care work and because of the broad notion of care that is presented.

Another interviewee said that the focus on care at EU level was new. Through the empirical research this thesis also sought to get behind the law books and Commission documents to explore with interviewees the question of how unpaid care came to be placed so highly on the EU policy agenda. Interviewees were asked to explain what was behind the shift in approach to reconciliation from the Roadmap's emphasis on economic growth to the Work Life Balance Initiative's emphasis on gender equality.

One interviewee described the period during which the Pregnant Workers Directive stalled at the Council and prior to the publication of the Work Life Balance Initiative in 2017 as very stagnant in terms of EU level actions in the field of EU Social Policy. Despite this apparent lack of innovation when the Work Life Balance Initiative was published, there was consensus among interviewees that it was a "win". Interviewees then explained that during this intervening stagnant period civil society groups began to consider strategies for overcoming the looming failure of the Pregnant Workers Directive. Informal discussions between civil society groups in Brussels began to take place on the topic of care and the subject gathered momentum. Interviewees went on to describe a very active and engaging period of discussions and alliance building, all centred on the issues surrounding care. Interviewees explained that the topic of care had a unifying force where groups who otherwise had disparate interests were connecting and building coalitions. The alliance of civil society groups that was brought together was wide-ranging and included gender equality groups, family rights groups, disability rights groups, Age Platform and those with concerns for long-term care, informal carers, service providers and trades unions. One interviewee described the issue of care to be very real in peoples' lives and to present huge and wide-ranging issues that a broad spectrum of stakeholders had interests in. They described the experience of

coming to the issue from different perspectives and of listening, learning and coming to compromises, all with a sense of collective responsibility. They described a committed and engaged alliance of actors who were able to work across sectors. And they said that it was from this position that they liaised with the Commission, putting pressure on them to commit to responding to the failure of the Pregnant Workers Directive with something new and something wider.

Interviewees also explained that the political context at that moment was favourable to introducing something that had the potential to be a flagship EU Social Policy measure. These political factors included, *inter alia,* the rising populism, nationalism and conservatism across the EU and the UK's vote to leave the EU. This political climate was contributing to a concern that the EU project may "*fall apart*". This anxiety prompted policy makers to search for a way to bring the EU back into the heart of things, in a positive way, for citizens, and to renew the EU's social, human side. Interviewees spoke of an increased appetite at the institutional level for EU Social Policy demonstrated by the adoption of the European Pillar on Social Rights in 2017 which indicated, said an interviewee, that at an institutional level there was an acknowledgement that the EU had to reach out to citizens to demonstrate the social face of the EU.

Looking forward, interviewees expressed optimism and they were very pleased with the revitalisation of EU Social Policy, with the focus on gender equality and the recognition of unpaid care work in the Work Life Balance Initiative and in the Work Life Balance Directive. However, they couched their optimism in the potential they saw the measures having rather than in the rights in force and were explicit in saying that more work had to be done to build on the foundations of the Work Life Balance Directive and to secure rights that could have a transformative impact on peoples' lives.

To sum up, the narrative that has emerged from the doctrinal and empirical research into the latest developments in the work-life balance agenda is positive and the developments are significant. The field of EU Social Policy and the agenda of work-life balance, in particular, appears to be remarkably revitalised and the measures have raised the profile of unpaid care work, and the solutions have gender equality as a foundation. This positive narrative contrasts with the bleak

period that came before the Work Life Balance Initiative where there was reason to be pessimistic about the future of EU work-life balance agenda. However, there are elements to this most recent narrative that signal that the major challenges that EU Social Policy has persistently been faced with remain unchanged. These are firstly, the ultimate difficulty of securing transformative rights, especially with regard to pay for care-based leaves. Secondly, the extent to which EU Social Policy is susceptible to the political winds, finding itself in and out of favour depending on the nature of the political crises of the moment. As such EU Social Policy may continue to suffer from periods of stagnation. However, the interviews with civil society groups reveal the comprehensive work that occurred behind the scenes to shift and expand understandings about the issues and needs surrounding unpaid care which culminated in a broad understanding of care - securing a prominent place on the agenda of the EU institutions which has contributed to moving EU Social Policy forward.

EU Free Movement of Persons

Following the study of the EU work-life balance agenda, this thesis turned to look beyond the field of EU Social Policy for the impact that the EU has on advancing or inhibiting progress towards a more equal distribution of unpaid care work. The EU work-life balance agenda specifically considers these issues but there are other areas of EU law that, while not focused on addressing these issues, can have an impact in terms of either advancing or entrenching gendered caring roles. This thesis looked at EU free movement of persons because the rights and protections within the legal framework intersect with the public and private spheres of life - with family and the labour market. The EU free movement rights hinge upon economic activity and as such have the capacity to influence people's working and caring lives. Furthermore, the gendered inequalities relating to low pay, pay gaps, risk of unemployment and reliance on a-typical work faced by women in their home state are correspondingly faced by women residing in her host Member State. In terms of unpaid care, mobile women in the EU face the added challenge of being "dislocated" from informal family networks which in most European

welfare systems make up the "back-bone of care".[500] Consequentially, mobile women's labour market participation which is critical to the full enjoyment of free movement rights is even lower than national rates and lower than the mobile male participation; of those women who are not working half of them reported that they are not working because of their caring responsibilities.[501] As such, the second aim of this thesis was to provide a structured analysis of how the free movement rules affect women when they have caring responsibilities whilst residing in another Member State, a perspective that has to a large extent been neglected in the scholarship.[502] To do so, this thesis undertook a doctrinal study of the free movement rules and ECJ jurisprudence (Chapter 4) and conducted empirical research (Chapter 5) which tested the doctrinal findings through interviews with civil society organisations in the fields of EU free movement of persons law and gender equality respectively.

What this thesis found is that the structure of the rules, their interpretation and their implementation uphold a regressive gender order and that when women's circumstances involve caring responsibilities or a combination of unpaid care and paid work, the extent and quality of her EU law rights and protections diminishes. To illustrate this claim, this thesis undertook a thematic study of the rules based around the following questions: Can women's unpaid care work contribute towards her status as a worker? How are women's rights affected when she combines paid work and unpaid care? What are the legal consequences for women's residence and associated rights if she does not qualify as a worker? And, do the rights for family members support women when they have caring responsibilities? (Chapter 4).

Fundamentally the free movement of persons legal framework fails women by not regarding unpaid care work as "work" for the purposes of Union law. The needs of women who have caring responsibilities were raised in the cases of *Züchner* and *Johnson* where unpaid care work was immediately dismissed as being incapable of

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[500] "The Gender Dimension of Geographic Labour Mobility in the European Union" Report cited *supra* note 29, p.85.
[501] "The Gender Dimension of Geographic Labour Mobility in the European Union" Report cited *supra* note 29, p. 60 and p. 95, "Fact finding analysis on the impact on Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence", cited *supra* note 311 at p.60
[502] "The Gender Dimension of Geographic Labour Mobility in the European Union" Report cited *supra* note 29.

being considered as work for the purposes of providing lawful residence.[503] Then in *Dias* periods out of work were prevented from being counted towards permanent residence. As a consequence, women who are not economically active due to periods of full-time caring responsibilities, which is a realistic prospect for mobile women with children under school age, face a number of potential challenges in securing and maintaining residence rights and protections. Two of the major challenges will be revisited now.

Turning first to the provisions in the Citizen's Rights Directive for family members of a Union citizen and the status of "primary carer" (as developed through ECJ case law). These rights *prima facie* offer a route to lawful residence and access to the free movement of persons rights and protections for women who are meeting the family's caring needs whilst in the host state. However, these rights are not autonomous rights, they are derivative rights and contribute to the marginalisation of those with caring responsibilities. These rights place women in a potentially precarious situation both legally and practically; they create a dynamic of dependency between the women and her partner whereby she becomes dependent upon her partner for continued access to her rights. The enforcement of her EU free movement rights requires evidence of her partners' residence and economic activity; her rights are therefore dependent upon his circumstances and his cooperation, factors that she may not have influence over. This precariousness is felt even more acutely by "primary carers". This status, developed through the ECJ case law with reference to the Workers Regulations, the Citizen's Rights Directive and Article 20 TFEU directly, is also structured as a derivative right and involves dynamics of dependency similar to the family member status. However, the scope of these rights remains unclear and significant clarification from the Court is needed. At present, unless the primary carer is economically active or financially self-sufficient the rights offer a poor version of the free movement rights and provide little protection from hardship and destitution in the host state.

For a time, Union citizenship, as it was emerging through the ECJ case law, offered a floor of protection to Union citizens living in a host state, particularly economically inactive Union citizens including women with caring

[503] Case 77/95, *Züchner*, Case C-31/90, *Johnson,* Case C-325/09, *Dias*.

responsibilities.[504] This law relating to economically inactive Union citizens is the second area to be revisited here. The case law concerning residence rights that immediately followed the introduction of Union citizenship by the Maastricht Treaty appeared to be making a "conscious attempt to free citizenship (and the integration project) from its market roots".[505] In these cases the ECJ began to construct an expansive formulation of the rights of Union citizens with reference to the Treaty - one that was not limited by those provided in secondary legislation. Furthermore the ECJ placed the individual citizen and their personal circumstances at the centre of the deliberations.[506] The reality of this approach for women living in another Member State was that she could demonstrate through her personal circumstances that she had a "real link" to the host Member State and as a Union citizen she could enjoy equal treatment there, thereby gaining access to social welfare, often crucial to her subsistence, whilst meeting her caring responsibilities.[507] At the present time it is possible to see a marked shift in the ECJ's approach to Union citizenship which appears to be curtailing the rights and protections available to economically inactive Union citizens, changes to which women with full time caring responsibilities are particularly vulnerable. The ECJ is no longer upholding the original approach to Union citizenship. Instead, the ECJ has said that if economically inactive Union citizens cannot fulfil the conditions set out in Directive 2004/38 then they fall outwith the scope of the Treaty. Furthermore, there is no longer a requirement to consider the citizen's individual circumstances and conduct a proportionality assessment.[508] The conditions of Directive 2004/38 involve economic activity or financial self-sufficiency and comprehensive health insurance. The result is that where the Directive once provided a "floor of rights" for Union citizens, rights that with reference to the

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[504] Case C-85/96, *Martinez Sala,* Case C-184/99, *Grzelczyk,* Case C-224/98, *MN D'Hoop v Office national d'emploi* [2002] ECR I-6191, Case C-413/99 *Baumbast and R,* Case C-459/99 *Mouvement contre racism, l'antisemitisme et la xenophobie ASBL (MRAX) v Etat Belge* [2002] ECLI:EU:C:2002:461, Case C-209/03 *Bidar*.

[505] Spaventa, "Earned Citizenship – Understanding Union Citizenship Rights through its Scope" in Kochenov (Ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017), pp. 204-225 at 207.

[506] Spaventa, op. cit. *supra* note 505 at p.207.

[507] Case C-85/96, Martinez Sala; Case C-184/99, *Grzelczyk;* Case C-456/02, *Trojani*; Case C-209/03 *Bidar*; Case C-188/89, *Foster*.

[508] Case C-333/13 *Dano*; Case C-67/14, *Alimanovic* and; Case C-299/14, *García-Nieto,* Case C-140/12 *Brey* and Case C-86/12, *Alokpa*.

evolving notion of Union citizenship in the Treaty could continue to develop, the Directive is now "the floor and the ceiling" of those rights and the Treaty is displaced, and as a result access to rights is curtailed. This has prompted commentators to condemn Union citizenship as a status for the exclusive enjoyment of the "wealthy, healthy and good" noting that it has "nothing to offer those who are marginalised, whose ability or potential to work is negligible".[509] Given that demographically, women's "ability or potential to work" is inhibited by her caring responsibilities it may be added to this vignette that the free movement rights and protections afforded by Union citizenship are for the exclusive enjoyment of the wealthy, healthy, good and *male*.

The empirical research conducted as part of this thesis sought to test these doctrinal findings (Chapter 5). Interviews with specialists in EU free movement of persons law who *inter alia* support EU nationals and their families in the UK to realise their EU law rights discussed the gender bias within the Citizen's Rights Directive and case law as they perceived it. They explained that to establish her free movement rights, women had to go about things in a round-about way, attempting to patch together rights that could secure a lawful residence. They pointed to the economic premise of the rights as problematic for women because the rules did not take into account the distinctive relationship that women have with the labour market due to her caring duties. It appeared to one interviewee that the EU institutions had failed to consider what women need in terms of access to rights in order to effectively reside in another Member State.

Due to the andro-centric notion of work that is privileged by the free movement rules, women who are consistently employed in their host Member State may not encounter problems in enforcing their Treaty rights. However, interviewees confirmed that women who are unable to work for periods of time on account of caring duties can face significant difficulties accessing rights and protections. This was acutely illustrated by examples interviewees gave concerning women who had faced domestic abuse. One interviewee described frequently working alongside Women's Aid (a UK charity supporting victims of domestic abuse) to support

[509] Spaventa, op. cit. *supra* note 505, "good" is added because Spaventa further discusses the significance of time spent in prison in relation to enjoying Union citizenship rights.

women and said that they face big problems in enforcing women's EU law rights in these situations. They described seeing women falling through "gaps" in rules due to their circumstances. These circumstances included when unmarried women, left their abusive partners and who had children who were not yet of school age. This combination of factors presents difficulties in accessing EU free movement rights and protections, said interviewees. Due to, on the one hand, the child care needs of their pre-school children, women had difficulty maintaining employment and therefore qualifying as a worker or qualifying for any other kind of lawful residence under EU law,[510] and due to the risk posed to her by her partner she was unable to provide evidence of her status as the family member of a Union citizen worker. One interviewee described women as seeking safety in refuges that they were not able to pay for. They said that organisations and charities were trying to help but that they would sometimes have to fund the accommodation for these women from resources set aside for other purposes because these women were not being recognised by the domestic, UK, benefits system as entitled to the relevant benefits.

When interviewees were asked about the future of the EU free movement rights and whether they could foresee the gender-disparate impact of the rules being overcome, they were pessimistic. One interviewee described the issue of care, gender equality and EU free movement of persons as being "in the shadows". They went on to discuss the importance of cases being brought that could raise these issues and to take the law further. However, they said that despite the Court being a key institution in the evolution of the field, progress is limited by the confines which the Court works within. The Court, they said, was an institution that was *inter alia* limited to the references that were brought by national courts.

The same subject was raised with the civil society organisations whose work was focused on lobbying for legal reform from the perspective of women's rights or family rights, who were based in Brussels. These discussions revealed that none of the interviewees from the gender equality or family rights organisations had made the connection between their work and gender equality in the context of intra-EU

[510] For example, she is out of the maternity leave period that is covered by Case C-507/12 *Jessy Saint Prix* but her children are not yet in education so cannot be covered by the Workers Regulation Art. 10 and Case C-413/99 *Baumbast and R*.

mobility; it was not something they had considered, and it was not something that they had come across and nor could one interviewee explain why this was the case. Another interviewee, by way of an explanation, described the EU NGO and policy making world as operating in silos and said that there was a feeling that the work of their organisation (a women's rights organisation) rarely extended to areas outwith the boundaries of what they described as traditional women's rights places.

Theoretically, the narrative that has emerged from the doctrinal and empirical research into the EU free movement of persons rules is one that points to EU law including the jurisprudence of the ECJ as upholding a regressive gender order. The Union citizen appears to be a reflection of the liberal self and the free movement legal framework appears to entrench the two spheres of life where the private sphere is devalued, care is marginalised, and an androcentric form of work is privileged. In practical terms the effect of this is that women, who are initially exercising their Treaty rights by moving to another Member State find themselves at "rights cliff edges"[511] due to the interaction of their roles as care givers in society and the free movement rules' disregard for this function. The diminished quality of her rights means that *inter alia* Union citizen women are having to patch together rights in order to reside lawfully and women in the most vulnerable situations find themselves legally isolated, denied subsistence benefits for herself and her children and risk being turned away from women's refuges. These issues do not form part of a political debate taking place amongst the civil society organisations that were interviewed nor does the Court appear to be concerned with the interaction between its case law and the "constitutional principle" of the EU of gender equality.[512] At this point it is difficult to foresee concrete steps that could in the near future lead to rights that would progress gender equality and the fairer allocation of unpaid care work in the context of intra-EU mobility.

[511] O'Brien (2013), op. cit. *supra* at note 344.
[512] Case C-507/12 *Jessy Saint Prix,* Opinion of Advocate General, para 2.

Contributing to Discussions on Gender, Care and EU law

The aim of bringing the study of EU Social Policy and EU free movement of persons together was to bring new insights and advance discussions surrounding care, gender, and EU law. It has added breadth to these discussions through exploring the role that the EU has in responding to the gendered impact of the unequal distribution of unpaid care work in an area that is not typically considered from this perspective. This thesis also adds depth to these discussions by taking a socio-legal approach to the research, thereby going behind the law books to interview stakeholders in the respective fields and seeking to understand how, from their perspective, the legal fields evolve and what impact the legal rules have.

Further significant contributions of this thesis are the two research questions that structured the analysis (as discussed in Chapter 2). As a reminder, they are based on two areas of scholarship by Nancy Fraser. Drawing from Fraser's work on the "politics of needs", this thesis asked how visible matters relating to unpaid care are in EU law and policy.[513] Fraser's work in this regard supported this analysis by illuminating the points on which to reflect when evaluating whether, and to what extent, a matter such as unpaid care has become "de-naturalised" and become a matter of public significance and of political action. The points to reflect on include *inter alia* considering whether the subject of unpaid care has crossed from the realm of private responsibility into a public, political arena of debate as well as considering the range and profile of the actors who are engaged in interpreting the issues surrounding unpaid care and how egalitarian and democratic the process of arriving at an interpretation of the issues has been. By asking this question it was possible to tease out and identify the extent to which unpaid care is visible in these different ways. In the area of Social Policy, the matter of unpaid care has become increasingly visible, the matter has been "de-naturalised" and is the subject of "discursive political" debate through the engagement of a wide range of civil society actors and EU institutions. The alliances formed and the collaborations that occurred were notable for their breadth and for their commitment to compromise, reflecting Fraser's ideal of democratic and egalitarian processes of needs interpretation. The gendered impact of unpaid care work is now a high-

[513] See Chapter 2 pp 23- 26 discussion of "visibility" and Fraser, op. cit. *supra* note 59.

profile matter of "official political" concern, exemplified by the Work Life Balance Directive 2019/1158.

In contrast, care has not been "de-naturalised" in the context of intra-EU mobility. The connections between the EU free movement rules and care, gender and the labour market are not visible in the policy or legal discourse. Through the structure of the rights in the Citizens' Rights Directive and the ECJ interpretation of these and the Treaty provisions on Union citizenship, care and those with caring responsibilities are marginalised. The matter of unpaid care work remains private. None of the actors are engaging with the gendered impact of unpaid care work and the implications it has for women's access to EU rights and protections. This is not being explored, investigated, or debated. The matter has not reached the moment Fraser refers to as "discursive political", a necessary precursor, she points out, to a matter becoming an "official political" concern where institutional level measures may be taken. It is not discussed amongst practitioners, advisors or civil society actors in the field of EU free movement law. Perhaps more notably, there is no engagement, in fact, no awareness of the issues amongst women's groups at EU level. A lobby whose effectiveness is evidenced in their work surrounding the Work Life Balance Directive.

Complementing the analysis on the visibility of unpaid care, the second question this thesis posed was whether, and to what extent, EU law and policy has a transformative impact in terms of the gendered impact of the unequal allocation of unpaid care. To do so it drew from Nancy Fraser's essay, "After the Family Wage: Gender Equity and the Welfare State".[514] In this essay, Fraser demonstrates the connection between gender equality and care. She articulates a comprehensive means of scrutinizing law and policy measures for their ability to contribute to a fairer allocation of unpaid care responsibilities and for their ability to progress gender equality. As such, this question enabled the analysis of EU work-life balance agenda and EU free movement of persons to each be critiqued, from a feminist perspective, for their ability to transform the gendered roles associated with unpaid care work and progress gender equality and the fairer allocation of unpaid care work. In terms of the most recent developments in the

[514] Fraser, op. cit. *supra* note 37.

work-life balance agenda, gender equality has become a prominent objective, no longer overshadowed by the pursuit for economic growth, and the understanding of care has become broader to encompass men's role in unpaid care, care throughout the life cycle, becoming less focused on motherhood. The measures are undermined by the lack of pay for care-based leave that can make such leaves more affordable for men and therefore for families. However, some critical steps have been made towards transforming the gendered roles associated with unpaid care and towards transforming how responsibility for unpaid care is allocated. The EU free movement of persons legal framework on the other hand, appears to entrench an andro-centric form of work where all but the most limited forms of care-based leave are provided for and where women see the quality of their rights diminish upon assuming caring responsibilities, where the lawfulness of her residence becomes precarious, where she risks losing access to equal treatment rights, including the ability to receive welfare support during the period of her caring duties and where the ability to achieve permanent residence is inhibited. Far from being transformative, the free movement of persons legal framework reproduces and reinforces the gendered disadvantages associated with the unequal distribution of unpaid care work.

The intention of this thesis is not to make a claim, through the use of these two overarching questions, about the interaction of, on the one hand, the visibility of the issue of unpaid care and, on the other hand, the potential of rights to have a transformative impact. Rather, what these two questions have enabled is the study of two areas of EU law and policy that are very different in their treatment of the subjects of gender and care to be conducted in a consistent and illuminating way. These questions have enabled different strands of study to be teased out, examined and evaluated. By studying the legal rights from a critical feminist perspective and by looking closely at the intersecting institutional dynamics involved in political debate and legal reform and by exploring the impact of the rules on the ground these two questions have provided a fine-grained understanding and evaluation of how the EU is responding in law and policy to the gendered impact of the unequal sharing of unpaid care work and what scope there is for future progress. As such, this thesis has revealed the extent of the rights and challenges in each policy area and, crucially, the internal dissonance between

them. Furthermore, it has demonstrated the need for further work to increase awareness amongst civil society organisations of the gendered dimension of intra-EU mobility and the impact of the EU free movement of persons rules on women. In this way, this thesis has innovatively brought new perspectives and new analysis to the scholarship on EU law, gender, and care. Furthermore, it provides a platform for the EU to address and respond to the shortcomings and inconsistencies in the EU's approach to equality between women and men, a value that the EU is founded upon[515] and an aim that the EU is committed to promoting.[516]

Post-script - Reflections on Recent Developments and Future Research

By the end of this research project the difficulty of overcoming the gendered impact of the unequal distribution of unpaid care has become radically intensified. In the Spring of 2020 Covid-19 had become a pandemic and had put most of the world into "Lockdown".[517] People were asked to stay at home; shops, cafes, offices and schools were closed; public events were cancelled; routine medical appointments were postponed; people were furloughed from their jobs and all but essential services were suspended. Daily life was hugely disrupted on a global level.

During this unprecedented time our attention became focused on care. We became acutely aware of front-line staff risking their own lives each day to care for the sick and elderly. We became indebted to low-paid supermarket staff and warehouse workers who in normal circumstances had been dismissed as unskilled but who were elevated to the status of essential, key workers exempt from the "Lockdown" restrictions. There was nationwide empathy for parents who were attempting to work from home whilst simultaneously caring for their children,

[515] Article 2 TEU.
[516] Article 3 TEU.
[517] WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020, https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 (last visited 15 November 2020); BBC News Coronavirus: The world in lockdown in maps and charts, 6 April 2020, https://www.bbc.co.uk/news/world-52103747 (last visited 15 November 2020).

attempting home schooling, and managing their family's health and well-being. While people felt isolated at home, public messages of care and support appeared in people's windows and on the streets. Mutual aid groups were created in neighbourhoods and volunteers signed up to help meet the practical needs of people who had to self-isolate to protect themselves. Expressions of care and support were a source of strength and courage. The giving and receiving of care and its essential place in our everyday lives became visible and tangible. What became manifestly clear during this time was that we are in many ways more dependent on others than we had perhaps previously acknowledged.

The Covid-19 pandemic also brought to our attention the socio-economic, racial and gender inequalities, amongst others, that, already present in society, were being intensified as different groups began to experience serious hardships. Amongst the gendered impact of the pandemic was the accelerating scale of unpaid care responsibilities faced by women. Hospitals and health care services were curtailed, many having to limit or suspend services, leading to an increased burden on families to provide care to elderly and unwell family members. In some circumstances this may have led to Covid-19 patients still requiring care and support being discharged early to allow for incoming patients. Women as the main care givers in families would disproportionately face the responsibility of meeting the needs of recuperating family members. The closing of schools and nurseries shifted virtually all childcare and schooling needs back home, with the exception of some support for essential and key workers. The responsibility to meet these unpaid care needs largely fell to women within the family, impacting, amongst other things, on their ability to work, particularly where it was not possible to work from home.[518] The Covid-19 "global crisis" noted the UN, "has made starkly visible the fact that the world's formal economies and the maintenance of our daily lives are built on the invisible and unpaid labor of women and girls".[519] There is now concern that the combination of the greater care demands at home, potential consequential job insecurity and redundancies in the female-dominated

[518] See further United Nations, "Policy brief: The Impact of COVID-19 on Women", available at https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/policy-brief-the-impact-of-covid-19-on-women-en.pdf?la=en&vs=1406 (last visited 30 November 2020).
[519] United Nations, "Policy brief: The Impact of COVID-19 on Women", cited *supra* note 518 at p.13.

service sector, among other factors, will entrench the hardships women faced during the pandemic and lead to "rolling back the already fragile gains made in female labor force participation, limiting women's ability to support themselves and their families". [520]

As states and global institutions plan for a recovery from Covid-19 that will restore economies and livelihoods there is an opportunity to re-evaluate the status quo, to reconsider commonly held values and to set new goals that can build greater resilience within society and attempt to "build back better".[521] Such a recovery plan would be wide-ranging and consider, for example, the environmental as well as socio-economic implications of the crisis. With respect to gender and unpaid care this involves reflecting on the value of care and carers in society and of questioning notions of independence and autonomy in the context of the interdependence we experienced during the pandemic. The UN finds that "perhaps the clearest lesson emerging from the pandemic" is that the recovery must include, "gender-responsive economic and social policies [that place] women's economic lives at the heart of the pandemic response and recovery plans."[522]

This thesis asked how the EU is responding in law and policy to the gendered impact of the unequal distribution of unpaid care work. It has used theoretical tools to develop a framework that can evaluate the visibility of care and gender equality within the policy making process and the legal framework and it has criticised alternative approaches from a gender equality perspective. This research has become even more relevant because an understanding of how law can progress both gender equality and the fairer allocation of unpaid care work is distinctly valuable to this period of Covid-19 recovery. However, further research into the impact of the pandemic on women is urgently required to ensure that gender responsive policies remain high on the agenda and are part of the post-Covid-19 recovery process.

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[520] United Nations, "Policy brief: The Impact of COVID-19 on Women", cited *supra* note 518 at p.4.
[521] For example, OECD, "Building Back Better: A Sustainable, Resilient Recovery after COVID-19", OECD Policy Responses to Covid-19, 2020, available at https://read.oecd-ilibrary.org/view/?ref=133_133639-s08q2ridhf&title=Building-back-better-_A-sustainable-resilient-recovery-after-Covid-19 (last visited 30 November 2020).
[522] United Nations, "Policy brief: The Impact of COVID-19 on Women", cited *supra* note 518 at p.5.

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Appendix 1 Interview Schedule

Interviewee	**Date**
Interviewee 1	23 November 2016
Interviewee 2	23 November 2016
Interviewee 3	30 November 2016 and 30 November 2020
Interviewee 4	30 November 2016
Interviewee 5	29 November 2016
Interviewee 6	20 January 2020
Interviewee 7	9 March 2020